Supreme Court
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No.: _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT, AND ALL OTHER SIMILARLY SITUATED PERSONS, *Petitioner,*

v.

MOSAIC FERTILIZER, LLC, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari
Brief for Petitioners

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QUESTIONS PRESENTED

I. **Does CAFA provide the exclusive grant of subject matter jurisdiction to federal district courts over state court putative class action litigations removed to a federal court after February 18, 2005?**

III. **If CAFA is not the exclusive grant of subject matter jurisdiction over state court putative class actions removed after February 18, 2005, may a state statute vest a federal district court with original subject matter jurisdiction?**

III. **If CAFA is the exclusive jurisdictional provision for state court putative class action litigations removed to federal court after February 18 2005, did Mosaic meet its burden of proof on removal?**

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Florence Harvey, Ulysses Gauthreaux, Lionel and Ernestine Albert: *Plaintiff-Appellant*;
MOSAIC FERTILIZER, LLC; *Defendant-Appellee*.

CORPORATION DISCLOSURE STATEMENT

Petitioners are not a corporation. Sup. Ct. R. 29.6.

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H. *Motion for Leave of Court to File Reply to Opposition to Motion to Remand* -
I. with attached *Reply to Opposition to Motion to Remand*; and
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Florence Harvey, Ulysses Gauthreaux, Lionel and Ernestine Albert respectfully pray that a writ of certiorari be issued to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinions of the United States Fifth Circuit Court of Appeal (App. A) and the United States District Court for the Eastern District of Louisiana (App. A) are reported as follows:

In Re: Florence Harvey; Ulysses Gauthreaux; Lionel Albert; Ernestine Albert, and all other similarly situated persons, No. 07-30327 (5th Cir. 5/29/07)

Florence Harvey et al v. Mosaic Fertilizer, L.L.C., 06-9510, 2007 WL 861183 (E.D. La. 3/19/07)

JURISDICTION

The Judgment of the United States Fifth Circuit Court of Appeal was entered on May 29, 2007, (App. A). This Court has jurisdiction pursuant to 28 USC § 1254 (1).

STATUTES INVOLVED

The statute involved is 28 USC § 1332 (a) as opposed to (d).

CAUSE TO GRANT REVIEW ON CERTIORARI

Whether CAFA provides the exclusive grant of federal court subject matter jurisdiction over a removed state court putative class action after February 18, 2005, is an important question of federal law that has not been, but should be, settled by this Court.

Additionally, a finding that the state court statute, at issue here, provides a basis for federal court jurisdiction on removal is a finding on an important federal question that conflicts with relevant decisions of this Court.

This putative class action was removed from a Louisiana state court on the basis that Louisiana Code of Civil Procedure Article 595 creates federal subject matter jurisdiction pursuant to 28 USC § 1332 (a). See Ex C: *Notice of Removal*, at 2, ¶¶ 5-14. An alternative basis for jurisdiction cited was 28 USC § 1332 (d) "CAFA", § 1441 (a) and (b) and § 1453. See Ex C: *Notice of Removal*, at 4, ¶ 15.

In finding it had subject matter jurisdiction over this proposed state court class action litigation, the district court specifically relied upon 28 USC § 1332 (a), and Louisiana Code of Civil Procedure art. 595 to cumulate attorney fees to the claims of the proposed class representatives to find that at least one claim met the jurisdiction amount pursuant to 1332 (a).

The District Court further wrote, "**The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)**." [Emphasis added] See Ex B: *Order and Reasons*, at 2, nt. 1. The district Court, thus, failed to apply CAFA Section 1453 or 1332 (d) to the removal of this action, which was error.

The lower courts erred in failing to find that removal of a class action from state court after February 18, 2005, is governed **exclusively** by CAFA - Section 1453 and Section 1332 Subpart (d). This is an important question of federal question, which this Court should settle.

Where Congress, through 2005 Acts, amended 28 USC § 1332 to add subpart (d) and added § 1453 [Class Action Fairness Act CAFA] to specifically address subject matter jurisdiction of the federal courts over class action litigation removed from state court after February 18,

2005, the District Court erred in failing to restrict its review of subject matter jurisdiction to those specific provisions.

Should this Court find that the District Court properly disregarded §§ 1453 and 1332 (d) in favor of §§ 1332 (a) and 1441 (a)(b), the District Court's reliance on La. C.C.P. art. 595 to establish federal subject matter jurisdiction was in error. In Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), this Court found that the All Writs Act, 28 USC § 1631, is not a separate grant by Congress of subject matter jurisdiction to the federal district courts. If the All Writs Act cannot be used as a basis for removal jurisdiction, then *a fortiori* a state statute may never be so used. Finding a state statute provides a basis for federal court jurisdiction was a decision on an important federal question which decision conflicts with a relevant decision of this Court and a recent Act of Congress.

28 USC §§ 1453 and 1332 (d) provides the exclusive jurisdiction of federal courts over putative class action litigations removed to federal court. Grant and its progeny did not survive the amendment to Section 1332, which, through subpart (d), specifically addresses the exclusive jurisdiction of the federal courts over state court class action litigation removed to federal court.

This action does not meet the jurisdictional minimum of CAFA and there are no claims before the district court, which meet the jurisdictional minimum for a federal court to assert subject matter jurisdiction over an action pursuant to 28 USC 1332 (a). Moreover, where this action could not have been originally filed in federal court, a federal court may not obtain jurisdiction on the basis of removal.

This Court should grant this application, review, render, reverse and remand this action to state court.

STATEMENT OF THE CASE

A. Factual Allegations

On or about October 11, 2006, workers at Mosaic "Faustina" Facility were processing product when hydrogen gas escaped and ignited resulting in a large explosion. Due to claims of property damages

associated with the explosion, this litigation followed.

The Plaintiffs, as proposed class representatives, filed a putative state court class action pursuant to La. C.C.P. art. 595 on behalf of the following:

THE CLASS:

> The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

The Plaintiffs prayed that the issue of liability be certified for class wide adjudication. The basis of liability pled against Mosaic is negligence including *res ipsa loquitur* and *respondeat superior.*

B. Procedural History

On October 12, 2006, *Class Action Petition for Damages* [1-2] was filed in St. James Parish, Louisiana. On November 3, 2006, *Notice of Removal* was filed removing the state court action to the Federal District Court in and for the Eastern District of Louisiana. [2] On November 21, 2006, *Motion to Remand (With Reservation)* and *Memorandum in Support of Motion to Remand (With Reservation)* was filed in the federal action. On January 15, 2007, *Opposition to Motion to Remand* was filed. On January 19, 2007, *Motion for Leave of Court to File Reply to Opposition to Motion to Remand* with attached *Reply to Opposition to Motion to Remand* was filed. On January 23, 2007, the District Court entered *Order Adjudicating Motion for Leave of Court to File Reply to Opposition to Motion to Remand* was filed. On March 19, 2007, the District Court entered *Order and Reasons* denying the motion to remand.

An application for issuance of a writ of mandamus followed, which was denied by the Fifth Circuit on May 29, 2007.

C. Action of the trial court

The District Court for the Eastern District of Louisiana failed to apply 28 USC § 1332 (d) and § 1453, which provides exclusive jurisdiction of the federal courts over putative state court class action litigation both filed and removed to federal court after February 18, 2005, and, instead, applied the general jurisdictional provision found in 28 USC §§ 1332 (a) and 1441 (a)(b). The District Court further found that a Louisiana state statute provided a basis for federal court jurisdiction. These rulings were legally erroneous.

D. Action of the Fifth Circuit Court of Appeals

On a timely application for a writ of mandamus from the United States Fifth Circuit Court of Appeals, on May 29, 2007, the Fifth Circuit issued a judgment denying the writ application.

E. Basis for jurisdiction of the Fifth Circuit

The stated basis for jurisdiction was as follows:

> The jurisdiction of this Court [Court of Appeals] is founded in the Constitution of the United States Article III, to test the subject matter jurisdiction of the federal courts over the action herein. See also, 28 U.S.C. § 1447 (c) ("If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

Here, an appeal to the Fifth Circuit did not lie, because the District Court in its ruling applied 28 USC § 1441 (a) and Section 1332 (a) rather than Section 1453 and 1332 (d); thus, mandamus remained the appropriate vehicle for the remand of this action.

Technically, one could argue that if this Court were to find that the lower courts erred in applying §§ 1331 (a) and 1441 (a)(b), an appeal, rather than a writ application, would have been the appropriate remedy for review by a court of appeal pursuant to § 1453 [CAFA],

but, as stated above, the ruling of the District Court, rather than argument of Petitioners, creates the basis for review. Here, the ruling did not address CAFA, except to mention that it was not addressed.

REASONS FOR GRANTING THE PETITION

Issue: ***Does CAFA provide the exclusive grant of subject matter jurisdiction to federal district courts over state court putative class action litigations removed to a federal court after February 18, 2005?***

Here, the District Court wrote, "The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)." See Ex B: *Order and Reasons*, at 2, nt. 1. Rather than apply CAFA, the District Court instead applied 28 USC § 1441 (a)(b) and 1332 (a) and, thus, failed to apply CAFA Section 1453 or Section 1332 (d) to the removal of this action, which was in error.

Whether removal of a class action filed in state court after February 18, 2005, is governed **exclusively** by Section 1453 and Section 1332 Subpart (d) is an important question of federal law that has not been addressed by this Court.

The HISTORICAL AND STATUTORY NOTES addressing the enactment of CAFA, § 1332 (d), provide the following:

> 2005 Acts. Publ.L. 109-2, § 9, Feb. 18, 2005, 119 Stat. 14, provided that: "The amendments made by this Act [the Class Action Fairness Act of 2005, which enacted this note and 28 U.S.C.A. §§ 1453 and 1711 to 1715, amended 28 U.S.C.A. §§ 1332, 1335, and 1603, and enacted provisions set out as notes under 28 U.S.C.A. §§ 1711, 2071, and 2074] **shall apply to any civil action commenced on or after the date of enactment of this Act [Feb. 18, 2005].**" [Emphasis added]

Similarly, the HISTORICAL AND STATUTORY NOTES addressing the enactment REMOVAL OF CLASS ACTIONS provide the following:

> 2005 Acts. Amendments by Class Action Fairness Act of 2005, Publ.L. 109-2, Feb. 18, 2005, 119 Stat. 4, **applicable to any civil action commenced on or after Feb. 18, 2005**, see Publ.L. 109-2, § 9, set out as a note under 28 U.S.C.A. § 1332. [Emphasis added]

Where Congress used the mandatory "shall" and this action was filed on October 12, 2006, the District Court was statutorily limited by an Act of Congress to applying CAFA to this action, because this action was "**filed under** rule 23 of the Federal Rules of Civil Procedure or **similar State Statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action**." [Emphasis added] See, Subpart (d)(1)(B).[1]

Subpart (d)(2)(C) provides that "[A] district court shall have original jurisdiction of any civil action in which the **matter in controversy exceeds the sum or value of $5,000,000,** exclusive of interest and costs, and is a class action in which - . . . ." Thus, where Mosaic, the defendant removing party, was unable to meet it burden of proof on removal under CAFA, this action should have been remanded for lack of subject matter jurisdiction.

Besides the congressional statutory mandate, a fundamental rule of statutory interpretation, which requires no authority, is that where there are two or more statutes, the specific supersedes the general.[2]

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[1] See also, Patterson v. Dean Morris, L.L.P., 448 F.3d 736, 739 (5th Cir. 2007)("CAFA provides for original jurisdiction in federal courts of certain class actions 'commenced on or after the date of enactment,' which is February 18, 2005.")

[2] See, Syngenta, infra, 537 U.S. at 32. ("'[w]here a statute specifically address the particular issue at hand, it is that authority, and not the All Writ Act, that is controlling.'" citing, Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 41,

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Here, CAFA provides a specific and limited grant of subject matter jurisdiction over "class actions" filed and removed from state court after February 18, 2005.

Mosaic, however, argued in District Court, "Plaintiffs cite no authority whatsoever for the argument that CAFA is now the "exclusive" basis for federal court jurisdiction over class actions. Traditional diversity jurisdiction under 28 USC § 1332 (a) still exits." Ironically, Mosaic cited no authority for its position that CAFA, which is specific to "class action" does not apply, and, that, instead, the general provisions of Section 1332 (a) still apply post-CAFA to "class actions" and survive the CAFA.

Thus, the District Court erred in failing to apply CAFA to this Action. This Court should determine whether Sections 1441 (a)(b) and 1331 (a) still apply to putative class actions removed from state court.

Had the District Court applied CAFA, besides the jurisdictional minimum of $5M found in (d)(2), 28 USC § 1332 (d)(6) would have applied to this action and provides as follows:

> (6) In any class action, **the claims of the individual class members shall be aggregated** to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

Under CAFA, the District Court could not have applied Grant, discussed below, to aggregate any "substantive discretionary" award of attorney fees and costs solely in the claims of the few class representatives. Subpart (6) abrogates Grant by requiring that the "claims of the individual class members shall be aggregated."

The District Court erred in failing to apply CAFA to this post-CAFA state court putative class action. Moreover, as discussed below, under CAFA, Mosaic failed to meet its burden of proof. This Court should review this matter, and this action should be remanded

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106 S.Ct. 355, 88 L.Ed.2d 189 (1985).)

to state court.

Issue: ***If CAFA is not the exclusive grant of subject matter jurisdiction over state court putative class actions removed after February 18, 2005, may a state statute vest a federal district court with original subject matter jurisdiction?***

If this Court were to find that CAFA is not the exclusive jurisdictional statute governing the removal of putative state court class action to a federal district court after February 18, 2005, the trial court erred in finding that original subject matter jurisdiction in federal court may arise out of a state court procedural statute.

Where this Court has answered a similar question regarding the All Writs Act in the negative (All Writs Act does not provide a separate grant of original subject matter jurisdiction to support removal), this Court should grant review of the lower court rulings where the lower courts have decided an important federal question in a way that conflicts with a relevant decision of this Court and a recent Act of Congress.

This Court has never considered the affect of CAFA on the general jurisdictional statutes. This Court has never considered the affect of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), on Grant v. Chevron, 309 F.3d 864 (5th Cir. 10/11/02), cert denied, 538 U.S. 945, 123 S.Ct. 1631, 148 L.Ed.2d 486 (2003), a Fifth Circuit opinion which allows a state court procedural statute to form the basis for original subject matter jurisdiction on removal of putative state court class action from a Louisiana state court.

Syngenta involved a Louisiana state court products liability action which was removed to the Middle District of Louisiana and then transferred to the Southern District of Alabama where a national settlement was pending. As a basis for original subject matter jurisdiction the transferror court relied upon the All Writs Act and Supplemental Jurisdiction to exercise federal subject matter jurisdiction over the action. The decision of the Eleventh Circuit to reverse and remand was unanimously affirmed by this Court, which, through Chief Justice Renhnquist, wrote, 123 S.Ct. at 369:

> The court [Eleventh Circuit] reasoned that § 1441 by its terms authorizes removal only of actions **over which the district courts have original jurisdiction.** [Emphasis added]

This Court further explained, 123 S.Ct. at 370, as follows:

> The general removal statute, 28 USC § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending," **unless Congress specifically provides otherwise.** § 1441 (a). **Under the plain terms of § 1441 (a), in order properly to remove the Henson action pursuant to that provision, petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts**. They concede that **the All Writs Act "does not, by its specific terms, provide federal courts with an independent grant of jurisdiction.**" Brief for Petitioners 9; see also Clinton, 526 U.S., at 534-535, 119 S.Ct. 1538 (express terms of the All Writs Act confine a court "to issuing process in aid of its existing

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> statutory jurisdiction; the Act does not enlarge that jurisdiction"). **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.** [Emphasis added]

If the All Writs Act does not qualify as an Act of Congress that vests original jurisdiction in the federal courts, then *a fortiori*, a state statute, La. C.C.P. art. 595, cannot.

Here, where the Louisiana Class Action Statutes La. C.C.P. art. 595, neither can, nor does, provide federal courts with an independent grant of subject matter jurisdiction, the state statute cannot confer the original jurisdiction required to support removal pursuant to § 1441.[3] "Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court." Syngenta, 123 S.Ct. at 371. Syngenta explains that § 1441 cannot provide original jurisdiction to an action which could not have been originally instituted in a federal court. Although a court may look at the value of the action at the time of removal, it must determine the value of the case under federal law **as though the action had been originally filed in a federal district court**.

A federal district court would have had no subject matter jurisdiction over this action had it been originally filed in federal court, because the claim of each named Plaintiff does not meet the jurisdictional minimum. Moreover, the Plaintiffs could not have invoking a Louisiana procedural statute as a basis to vest the federal court with original subject matter jurisdiction. According to Syngenta, if the case could not have been originally filed in federal court, such a case cannot be removed to federal court. To the extent Grant was not

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[3] "The third article of the Constitution declares that 'the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish.'" Sheldon v. Sill, 8 How. 441, 12 L.Ed. 1147 (U.S. 1850).

abrogated by CAFA, review on certiorari should be granted by this Court and Grant should be reconsidered in light of Syngenta as well as Louisiana Code of Civil Procedure Article 4, discussed below.

This Court's analysis set forth in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (**11/5/02**), should not be ignored in this case, simply because this Court did not discuss Grant v. Chevron, 309 F.3d 864 (5th Cir. **10/11/02**), which decision **predates** Syngenta **by one month**. The rendering of Grant and Syngenta is near contemporaneous and neither case mentions the other. Additionally, although this Court made no mention of Grant, Syngenta still impacts Grant and the present lawsuit,[4] because Syngenta redirects the analysis of removed actions.

Through Grant, the Fifth Circuit instructed its district courts to determine the amount in controversy at the time of removal but while the action was in state court, i.e., **what was the value of the case while in state court?** To assess the value of a Louisiana class action, while it was in state court, in Grant, the Fifth Circuit relied upon a Louisiana procedural article, **which, once the action was in federal court, may no longer be applied.** According to Syngenta, if the state court procedural statute would not apply had the action been originally filed in federal court, it will not apply to a district court's analysis of subject matter jurisdiction on removal. Such is the case with La. C.C.P. art. 595, which provides, as follows:

> A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or

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[4] There is neither a Supreme Court nor Fifth Circuit rule which states that to impact an earlier decision of a lower court, the decision of a higher court must specifically discuss or mention that case.

compromise is had which is beneficial, to the class.

Through Syngenta, this Court instructed that the proper analysis for district courts to follow is whether at the time of removal the action could have been originally filed in a federal district court. The proper question, thus, is **what is the value of the case had it been originally filed in federal court?**

Syngenta directs the district courts to make a determination of subject matter jurisdiction with the assumption that the action had been originally filed in federal court.

The greater issue, raised by Syngenta's implicit impact on this case, is whether Grant vests the Louisiana Legislature with the authority under the United States Constitution to enact procedural statutes that vest federal district courts with original subject matter jurisdiction. If Louisiana's procedural statutes in any manner govern an action for diversity purposes once in federal court, then the federal district courts would also be bound by Louisiana's subject matter jurisdictional statutes, including Louisiana Code of Civil Procedure article 4, which provides as follows:

> When the jurisdiction of a court over the subject matter of an action depends upon the amount in dispute, or value of the right asserted, it shall be determined by the amount demanded, including damages pursuant to Civil Code Articles 2315.3 and 2315.4, or value asserted in good faith by the plaintiff, **but the amount in dispute does not include interest, court costs, attorney fees, or penalties, whether provided by agreement or by law.** [Emphasis added]

Thus, if it were constitutionally permissible for a federal district court to look to a Louisiana procedural statute as a basis to determine the value of a case (**while it was in state court**) for the purposes of original federal diversity jurisdiction, according to Louisiana law on subject matter jurisdiction, the award of attorney fees or costs to the class representatives **may not** be considered

when determining the value of the case.

But, the more interesting point raised by La. C.C.P. art. 4 is the contrast in questions posed by Grant **(what was the value of the case while in state court?)** and by Syngenta (**what is the value of the case in federal court?**), because according to Article 4, a Louisiana State Court could not consider a possible award of attorney fees or costs in determining the value of a case.

Implicitly, the Fifth Circuit's analysis in Grant grants the Louisiana Legislature with a power vested only in Congress. What if the Louisiana Legislature amended La. C.C.P. art. 4 to provide that any cases filed in the State of Louisiana district court against a foreign defendant will be presumed to be valued greater than 75,000.00? Would every Louisiana case involving a foreign defendant be removable? Under Grant, the answer is yes. Under Syngenta, the answer is no, because a state statute cannot vest a federal court with subject matter jurisdiction. The constitutional underpinnings of the Syngenta analysis trump that of Grant.

In Syngenta, this Court found that since the All Writs Act was not a specific grant, by Congress, of original subject matter jurisdiction to the federal district court, thus, the All Writs Act could not be used as a basis for jurisdiction on removal pursuant to § 1441. Here, certainly, Louisiana's Class Action Statute cannot form a basis to vest a federal district courts with original subject matter jurisdiction. Thus, the analysis or approach utilized by the Fifth Circuit in Grant[5] should be reevaluated in light of Syngenta.

In Syngenta, the plaintiff could not have originally filed this action in federal court and pled the All Writs Act or Supplemental Jurisdiction to vest a federal district court with original subject matter jurisdiction.

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[5] Considering La. C.C.P. art. 4, Free v. Abbott Laboratories, 164 F.3d 270 (5th Cir. 1999), aff'd by equally divided court, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed. 2d 306 (2000), the underpinnings of Free may also be at issue.

Explaining, Chief Justice Renhnquist, wrote, 123 S.Ct. at 369:

> **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.** [Emphasis added]

Here, because a Louisiana procedural statute, which could not have been invoked in an original filing in federal court, may never confer jurisdiction on a federal court, the same Louisiana law cannot confer original jurisdiction required to support removal.[6] Again, **if the Plaintiffs could not have filed a complaint and pled Louisiana Procedural Statutes as a basis to vest a federal district court with original subject matter jurisdiction, then the statute cannot support removal.**[7]

If the All Writs Act cannot form a basis for original jurisdiction, then, *a fortiori*, a state statute may never do so.

In view of Syngenta, Grant is an unprecedented and unconstitutional grant of power to the Louisiana Legislature.

The final question before this Court is, if Grant

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[6] Because this is a diversity case, the Rules of Decision Act, 28 U.S.C. § 1652, and Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 822-23, 82 L.Ed. 1188 (1938), with its seeming constitutional underpinning, mandate that the substantive law applied be that of the relevant state, and procedural rules of the federal courts, apply.

[7] In 2003, Congress amended FRCP 23 to add subpart (g) and (h) specifically addressing class counsel and attorney fees awards in actions certified as a class action in federal court.

correctly found that the proper inquiry is what was the value while in state court and that Louisiana class action statute creates a substantive right vested in a class representative, what happens to subject matter jurisdiction once class certification is denied by a federal court?

Once certification is denied, there will no longer be any claim for attorney fees to cumulate to any class representative to meet any jurisdictional minimum for any claim. Subject matter jurisdiction cannot be illusory.

Even in Grant, 309 F.3d at 873, the Fifth Circuit reiterated that "Abbott[8] confirms that **when** the federal court **has jurisdiction over at least one member of the class** by virtue of (1) diversity of citizenship and (2) a sufficient jurisdictional amount, that court has supplemental jurisdiction over all diverse class members, including those whose claims fall short of § 1332's amount-in-controversy threshold."[9] Thus, where subject matter jurisdiction is illusory (based solely upon a state procedural statute that will not apply in federal court), remand/dismissal is inevitable.

According to Grant, in an action filed as a Louisiana class action, the class representatives "may" have what the Fifth Circuit described as a "discretionary" substantive right[10] to cumulate attorney fees and cost in their recovery; thus, increasing the value of each of the class representative's claims to greater than $75,000. According to Grant, this discretionary substantive right is not extinguished on removal or where the action is certified under FRCP 23, the right is maintained. In view of the enactment of FRCP 23 (h), which specifically addresses attorney fees in "an action certified as a class action" this section of the Grant analysis has been abrogated by positive law.

Thus, once a district court finds that class certification under FRCP 23 is improper and denies

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[8] Referencing, Free v. Abbott Laboratories, 164 F.3d 270 (5th Cir. 1999), aff'd by equally divided court, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed. 2d 306 (2000).

[9] See, Cradle v. Monumental Life Ins., Co., 354 F. Supp.2d 632 (E.D. Va. 2005), discussing and comparing state court statutes allowing awards of attorney fees.

[10] A "discretionary substantive right" may be a contradiction in terms known as an oxymoron.

class certification, the discretionary right, *vel non*, recognized by Grant is extinguished. Once the right to cumulate attorney fees and costs in the claim of a class representative is extinguished, then the value of those claim(s) must independently meet the jurisdictional minimum under Acts of Congress relating to federal subject matter jurisdiction.[11] 28 USC § 1332 (d)(11)(B)(i), provides, "[T]he term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)."

Additionally, 28 USC § 1332 (11)(B)(ii)(I) provides as follows: "As used in subparagraph (A), the term 'mass action' shall not include any civil action in which - all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." Here, all injuries occurred in the State of Louisiana.

If, other than the Louisiana Class Action statute, there is no independent basis for diversity jurisdiction, once class certification is denied, this action would require remand. 28 USC Section 1447 (c). Such analysis demonstrates the error of applying Grant, rather than CAFA, to this case.

The federal courts lack jurisdiction over this action.

"If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot

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[11] See 28 USC § 1332 (d)(11)(B)(i), which provides, "[T]he term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)."

stand. 'Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated.'" H&D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000), quoting, Caterpillar Inc. v. Lewis, 519 U.S. 61, 76-77 (1996).

Here, when the District Court elected to disregard Section 1453 and 1332 (d), the District Court further erred when it failed to analyze subject matter jurisdiction as though this action had been originally filed in a federal district court. This action should be remanded.

Issue: ***If CAFA is the exclusive jurisdictional provision for state court putative class action litigations removed to federal court after February 18, 2005, did Mosaic meet its burden of proof on removal?***

On this issue, Petitioners request that this Court review and render.

Where Mosaic could not adequately argue the application of Section 1453 and 1332 (d), and made no evidentiary showing that this action meets the CAFA jurisdictional minimum of $5M. Because Mosaic could not meet it burden under CAFA, it invoked pre-CAFA law, which the District Court erroneously adopted.

In Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006), Maytag, as the manufacturer of certain ranges and ovens, was sued in state court in a consumer class action under state law which action was removed to federal court under Class Action Fairness Act (CAFA). The original suit filed in state court alleged there were "thousands of members of the above-described class."

In support of its removal, Maytag offered the affidavit of its information analyst that there were a total of 6,729 ranges/ovens in Florida with the model numbers of those with the allegedly defective motorized door latch assembly and that the total value of those 6,729 ranges/ovens was $5,931,971.

After filing a motion to remand, the Plaintiff was allowed a discovery deposition and allowed to then submit the discovery to supplement its motion to remand to show that Maytag failed to carry its burden of proof by a preponderance of the evidence on the jurisdictional minimum to establish that more than $5,000,000 was in controversy.

Maytag argued that the burden proof on remand was on the Plaintiff to prove that jurisdictional amount was not met (proving a negative) citing and quoting from a Senate Committee Report directed to the CAFA. The Eleventh Circuit rejected Maytag's argument and held

that Maytag, as the removing party, bore the burden of proof by a preponderance of the evidence on the motion to remand to establish the jurisdictional amount.

The Eleventh Circuit in Miedema first cited the rule: "Under CAFA, federal courts have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." Miedema, 450 F.3d at 1327, citing, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1163 (11th Cir. 2006). The Eleventh Circuit then cited both a Seventh and Ninth Circuit opinion that rejected the suggestion found in the Senate Committee Report that the burden of proof be on the nonremoving party. The cases cited were Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well established rule that proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy), and Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.")

The Eleventh Circuit then cited its own precedent, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1164 (11th Cir. 2006), holding, "CAFA does not upset the traditional rule that the removing party bears the burden of proof with regard to establishing federal court jurisdiction."

For these reasons, the Eleventh Circuit found that the removing party bares the burden of proving the jurisdictional minimum by a preponderance of the evidence. The Eleventh Circuit also found that any doubts about the amount in controversy should be resolved in favor or remand and a finding of a lack of jurisdiction. Miedema, 450 F.3d at 1329, citing, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal statutes]." Syngenta Crop. Prot., Inc. v. Henson, 537 U.S. 28, 32 123 S.Ct. 366, 369, 154 L.Ed.2d 368 (2002) ("[S]tatutory procedures for

removal are to be strictly construed."); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("[R]emoval statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."); Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ([A]ll doubts about jurisdiction should be resoled in favor of remand to state court.").

On October 12, 2006, this suit, as captioned above, was filed in the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana, bearing docket number 31350. This suit filed originally in state court alleges that the damages for the entire class do not exceed $5M and that the individual property damage and medical claims associated with the explosion do not exceed $50,000 each. No jury was requested due to the jurisdictional restrictions in state court to obtain a jury. Louisiana Code of Civil Procedure Article 1732 (1).

In order to establish the amount in controversy, Mosaic relied upon the Plaintiffs' Petition which states that there are 200 putative class members. Mosaic argued that the amount in controversy "for at least one plaintiff" exceeds $75,000.00 exclusive of interest and costs. Rather than make any effort to show that this action meets CAFA's jurisdictional minimum, Mosaic instead relied upon Section 1332 (a) a general jurisdiction statute, which this Court should find to be inapplicable to putative class actions removed from state court.

Mosaic erroneously averred that even though this litigation is a state court class action sought to be removed to federal court, it need not meet CAFA, and it suggested, however erroneously, that the amount in controversy for a class action is met, through 28 USC § 1332 (a), because attorneys' fees and costs that may be awarded under Louisiana Code of Civil Procedure art. 595, in state court, may be attributable to the three named class representatives, which according to Mosaic rendered the amount in controversy on each of these claims in excess of $75,000 and thereby establishes jurisdiction over this class action.

The District Court adopted the rationale that a state statute may provide a basis for federal court subject matter jurisdiction and that pre-CAFA law

applies, citing, Grant v. Chevron Phillips Chemical Co., L.P., 309 F.3d 864 (5th Cir. 2002), seven times in a three page ruling.

This Court should find that rationale of Grant is abrogated by the 2005 Acts ("**matter in controversy exceeds the sum or value of $5,000,000**"). Even if Grant were not abrogated, there is good cause to review that decision and its rationale, as discussed above in the discussion of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02).

Thus, this Court should find that the removing party, here Mosaic, had the burden of proving that the aggregate value of this litigation is in excess of $5,000,000 and not that any class representative's claim is worth $75,000 by aggregating attorney fees with the claims of the class representatives.

Mosaic, attempting to shift its burden of proof on removal, argued that the Plaintiffs are required to enter into a stipulation as to the value of the case. The CAFA does not require such and the burden of proof, as shown above, on the jurisdictional amount is on Mosaic.[12] Mosaic, itself, could have entered such a stipulation, but chose not to do so. Additionally, although it was not Petitioner's burden of proof, Petitioners offered to conduct discovery solely on the jurisdictional amount. Ex F. The District Court did not address the request for discovery.

Mosaic incorrectly averred that the present class action is for fear and fright, yet, the Petition clearly states that it is limited to property damage, fear and fright claims associated with the property claims and to those rare persons with personal injuries associated with explosion. The putative class has not averred that breathing hydrogen or the products of its combustion are associated with personal injury or fear and fright.

Mosaic next averred that because the claims arise in St. James Parish that the Plaintiffs have thereby alleged that the entire Parish was damaged. Mosaic's characterization of the Petition is unfounded. The distance that the shock wave traveled through the ground and where it traveled is unknown at this time. Precertification discovery is necessary on this issue to properly define the class.

This Court should find that the removing defendant had the burden of proof and failed to meet its burden of proof under CAFA.

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[12] See Ray Mart, Inc. v. Stock Building Supply of Texas, 435 F. Supp. 2d 578, 585-586 (E.D. Tex. 2006), and cases cited and discussed therein.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted. **This Court should review, render and remand this action to state court.**

Respectfully submitted,

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Supreme Court, U.S.
FILED

07-268 AUG 27 2007

OFFICE OF THE CLERK

No.: _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT, AND ALL OTHER SIMILARLY SITUATED PERSONS, *Petitioner*,

v.

MOSAIC FERTILIZER, LLC, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

EXHIBITS
Petition for Writ of Certiorari
Brief for Petitioners

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U.S. DISTRICT COURT UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
IN RE: FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT, and all other similarly situated persons

Petitioners

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana, New Orleans

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Before DeMoss, Stewart, and PRADO, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is denied.

Filed May 29, 2007
US District Court
Eastern District of Louisiana
Loretta G. Whyte, Clerk
Case 2:06-cv-09510

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FLORENCE HARVEY, ET AL
Petitioners
v.

MOSAIC FERTILIZER, LLC
Respondents

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Pending in as Civil Action No: 06-9510 - S (5)
Honorable Mary Ann Vial Lemmon, District Judge, Presiding

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CIVIL PROCEEDING

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Plaintiffs certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or refusal.

All persons with a financial interest in the outcome of this litigation are as follows:

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is founded in the Constitution of the United States Article III, to test the subject matter jurisdiction of the federal courts over the action herein. See also, 28 U.S.C. § 1447 (c) ("If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

I. SUMMARY OF ARGUMENT

This action was removed from state court on the basis that La. C.C.P. art. 591, *et seq.*, creates federal subject matter jurisdiction pursuant to 28 USC 1332 (a). See Ex B: *Notice of Removal*, at 2, ¶¶ 5-14. An alternative basis for jurisdiction cited were 28 USC § 1332 (d) "CAFA", § 1441 (a) and (b) and § 1453. See Ex B: *Notice of Removal*, at 4, ¶ 15.

In finding it had subject matter jurisdiction over this proposed class action litigation, the district court specifically relied upon 28 USC § 1332 (a), and La. C.C.P. art. 591, et. seq., to cumulate attorney fees and find that at least one claim met the jurisdiction amount. The District Court wrote, "**The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)**." [Emphasis added] See Ex A: *Order and Reasons*, at 2, nt. 1. The district Court, thus, failed to apply either Section 1453 or Section 1332 (d) to the removal of this action, which was error.

Removal of a class action form state court is governed **exclusively** by Section 1453 and Section 1332 Subpart (d).

Where the Congress, through 2005 Acts, amended 28 USC § 1332 to add subpart (d) and added § 1453 [Class Action Fairness Act CAFA] to specifically address subject matter jurisdiction of the federal courts over class action litigation removed from state court, the district court erred in failing to restrict its review of subject matter jurisdiction to those specific provisions.

Should this Court find that a district court properly disregarded §§ 1453 and 1332 (d) in favor of §§ 1332 (a) and 1441 (a)(b), the District Court's reliance on La. C.C.P. art. 591, *et seq.* to establish

federal subject matter jurisdiction was in error. In Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), the Supreme Court found that the All Writs Act, 28 USC § 1631, is not a separate grant by Congress of subject matter jurisdiction to the federal district courts. If the All Writs Act cannot be used as a basis for removal jurisdiction, then *a fortiori* a state statute may never be so used.

28 USC § 1453 and 1332 (d) provides the exclusive jurisdiction of federal courts over putative class action litigations removed to federal court. Grant and its progeny did not survive the amendment to Section 1332, which, through subpart (d), specifically addresses the exclusive jurisdiction of the federal courts over state court class action litigation removed to federal court.

This action does not meet the jurisdictional minimum of CAFA and there are no claims before the district court, which meet the jurisdictional minimum for a federal court to assert subject matter jurisdiction over an action pursuant to 28 USC 1332 (a). Moreover, where this action could not have been originally filed in federal court, a federal court may not obtain jurisdiction on the basis of removal to the court.

This Court should grant this application, review, render, reverse and remand this action to state court.

II. STATEMENT OF THE CASE

A. Factual Allegations

On or about October 11, 2006, workers at Faustina Facility were processing product when hydrogen gas escaped and ignited resulting in a large explosion. Due to claims of property damages associated with the explosion, this litigation followed.

The Plaintiffs as proposed class representatives filed a putative state court class action pursuant to La. C.C.P. art. 591, *et seq.*, on behalf of the following: THE CLASS:

> The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St.

James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

The Plaintiffs prayed that the issue of liability be certified for class wide adjudication. The theories of liability pled against Mosaic is negligence including *res ipsa loquitur* and *respondeat superior*.

B. Procedural History

On October 12, 2006, *Class Action Petition for Damages* [1-2] was filed in St. James Parish, Louisiana. On November 3, 2006, *Notice of Removal* was filed removing the state court action to the Federal District Court in and for the Eastern District of Louisiana. [2] On November 21, 2006, *Motion to Remand (With Reservation)* and *Memorandum in Support of Motion to Remand (With Reservation)* was filed in the federal action. On January 15, 2007, *Opposition to Motion to Remand* was filed. On January 19, 2007, *Motion for Leave of Court to File Reply to Opposition to Motion to Remand* with attached *Reply to Opposition to Motion to Remand* was filed. On January 23, 2007, the District Court entered *Order Adjudicating Motion for Leave of Court to File Reply to Opposition to Motion to Remand* was filed. On March 19, 2007, the District Court entered *Order and Reasons* denying the motion to remand.

This application for issuance of a writ of mandamus follows.

C. Action of the trial court

The District Court for the Eastern District of Louisiana failed to apply 28 USC § 1332 (d) and § 1453, which provides exclusive jurisdiction of the federal courts over putative state court class action litigation removed to federal court and, instead, applied the general jurisdictional provision found in 28 USC §§ 1332 (a) and 1441 (a)(b).

II. ISSUE PRESENTED FOR REVIEW

1. Whether Section 1453 and CAFA provides exclusive jurisdiction over state court putative class action litigation removed to federal court.
2. If not, may a state statute vest a federal district

court with subject matter jurisdiction.

3. If CAFA applies, did Mosaic meet its burden of proof on removal.

IV. RELIEF SOUGHT

Applicants seek a review, rendering, reversal and remand of this action to state court.

V. REASONS WHY WRIT OF MANDAMUS SHOULD ISSUE

The resources of both the Courts and the parties should not be exhausted in federal court, where the federal courts lack subject matter jurisdiction over this matter. Here, an appeal does not lie, because the District Court in its ruling applied 28 USC § 1441 (a) and Section 1332 (a) rather than Section 1453 and 1332 (d); thus, mandamus remains the appropriate vehicle for the remand of this action.

Technically, one could argue that if this Court finds that the District Court erred in applying §§ 1331 (a) and 1441 (a)(b), an appeal, rather than a writ application, would lie pursuant to § 1453 [CAFA], but, as stated above, the ruling of the District Court, rather than argument of Petitioners, creates the basis for review. Here, the ruling did not address CAFA, except to mention that it was not addressed.

A. Whether the federal district court has subject matter jurisdiction over this action.

The standard of review is *de novo.*

"We have a duty to raise the issue of subject matter jurisdiction *sua sponte.* See Christoff v. Bergeron Indus., Inc., 748 F.2d 297, 298 (5th Cir. 1984). **We must determine whether the district court would have had original jurisdiction had the case been filed there.** See 28 U.S.C. § 1441 (a)(1994)" H&D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000), cert. denied, 534 U.S. 894, 122 S.Ct. 214, 151 L.Ed.2d 152 (2001) [Emphasis added].

Issue: *Is CAFA an exclusive jurisdictional provision for state court putative class action litigations removed to federal court?*

Here, the District Court wrote, "The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)." See Ex A: *Order and Reasons*, at 2, nt. 1. The district Court specifically applied 28 USC § 1441 (a)(b) and 1332 (a) and, thus, failed to apply either Section 1453 or Section 1332 (d) to the removal of this

action, which was in error. Removal of a class action from state court is governed **exclusively** by Section 1453 and Section 1332 Subpart (d).

The HISTORICAL AND STATUTORY NOTES addressing the enactment of CAFA, § 1332 (d), provide the following:

> 2005 Acts. Publ.L. 109-2, § 9, Feb. 18, 2005, 119 Stat. 14, provided that: "The amendments made by this Act [the Class Action Fairness Act of 2005, which enacted this note and 28 U.S.C.A. §§ 1453 and 1711 to 1715, amended 28 U.S.C.A. §§ 1332, 1335, and 1603, and enacted provisions set out as notes under 28 U.S.C.A. §§ 1711, 2071, and 2074] **shall apply to any civil action commenced on or after the date of enactment of this Act [Feb. 18, 2005].**" [Emphasis added]

Similarly, the HISTORICAL AND STATUTORY NOTES addressing the enactment REMOVAL OF CLASS ACTIONS provide the following:

> 2005 Acts. Amendments by Class Action Fairness Act of 2005, Publ.L. 109-2, Feb. 18, 2005, 119 Stat. 4, **applicable to any civil action commenced on or after Feb. 18, 2005**, see Publ.L. 109-2, § 9, set out as a note under 28 U.S.C.A. § 1332. [Emphasis added]

Where the language is mandatory "shall" and this action was filed on October 12, 2006, the District Court was statutorily limited to applying CAFA to this action, which was "filed under rule 23 of the Federal Rules of Civil Procedure or similar State Statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." See, Subpart (d)(1)(B). Subpart (d)(2)(C) provides that "[A] district court shall have original jurisdiction of any civil action in which the **matter in controversy exceeds the sum or value of $5,000,000,** exclusive of interest and costs, and is a class action in which - . . . ." Thus, where Mosaic was unable to meet it burden of proof under CAFA on removal, this action should have been remanded.

Besides the statutory mandate, a fundamental rule of statutory interpretation, which requires no authority, is that where there are two or more

statutes, the specific supersedes the general. Here, CAFA is a specific jurisdictional rule governing jurisdiction over "class actions" removed from state court.

Mosaic, however, argued in District Court, "Plaintiffs cite no authority whatsoever for the argument that CAFA is now the "exclusive" basis for federal court jurisdiction over class actions. Traditional diversity jurisdiction under 28 USC § 1332 (a) still exits." Ironically, Mosaic cited no authority for its position that Subpart (d), which is specific to "class action" does not apply, and, that, instead, the general provisions of Section 1332 (a) still to "class actions".

Thus, the District Court erred in failing to apply CAFA to this Action. Sections 1441 (a)(b) and 1331 (a) no longer apply to class actions.

Issue: *If CAFA is an exclusive jurisdictional provision for state court putative class action litigations removed to federal court, did Mosaic meet its burden of proof on removal?*

On this issue, Petitioners request that this Court review and render.

Where Mosaic could not adequately argue the application of Section 1453 and 1332 (d), it must have had some knowledge that this action does not meet the $5M statutory minimum or it would not been arguing to apply the old law. Mosaic made no evidentiary showing that this action meets the jurisdictional minimum under CAFA.

In Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006), Maytag, as the manufacturer of certain ranges and ovens, was sued in state court in a consumer class action under state law which action was removed to federal court under Class Action Fairness Act (CAFA). The original suit filed in state court alleged there were "thousands of members of the above-described class."

In support of its removal, Maytag offered the affidavit of its information analyst that there were a total of 6,729 ranges/ovens in Florida with the model

numbers of those with the allegedly defective motorized door latch assembly and that the total value of those 6,729 ranges/ovens was $5,931,971.

After filing a motion to remand, the Plaintiff was allowed a discovery deposition and allowed to then submit the discovery to supplement its motion to remand to show that Maytag failed to carry its burden of proof by a preponderance of the evidence on the jurisdictional minimum to establish that more than $5,000,000 was in controversy.

Maytag argued that the burden proof on remand was on the Plaintiff to prove that jurisdictional amount was not met (proving a negative) citing and quoting from a Senate Committee Report directed to the CAFA. The Eleventh Circuit rejected Maytag's argument and held that Maytag, as the removing party, bore the burden of proof by a preponderance of the evidence on the motion to remand to establish the jurisdictional amount.

The Eleventh Circuit in Miedema first cited the rule: "Under CAFA, federal courts have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." 450 F.3d at 1327, citing, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1163 (11th Cir. 2006). The Eleventh Circuit then cited both a Seventh and Ninth Circuit opinion that rejected the suggestion found in the Senate Committee Report that the burden of proof be on the nonremoving party. The cases cited were Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well established rule that proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy), and Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.")

The Eleventh Circuit then cited its own precedent, Evans v. Walter Indus. Inc., 449 F.3d 1159,

1164 (11th Cir. 2006), holding, "CAFA does not upset the traditional rule that the removing party bears the burden of proof with regard to establishing federal court jurisdiction."

For these reasons, the Eleventh Circuit found that the removing party bares the burden of proving the jurisdictional minimum by a preponderance of the evidence. The Eleventh Circuit also found that any doubts about the amount in controversy should be resolved in favor or remand and a finding of a lack of jurisdiction. Miedema, 450 F.3d at 1329, citing, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal statutes]." Syngenta Crop. Prot., Inc. v. Henson, 537 U.S. 28, 32 123 S.Ct. 366, 369, 154 L.Ed.2d 368 (2002) ("[S]tatutory procedures for removal are to be strictly construed."); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("[R]emoval statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."); Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ([A]ll doubts about jurisdiction should be resoled in favor of remand to state court.").

On October 12, 2006, this suit, as captioned above, was filed in the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana, bearing docket number 31350. This suit filed originally in state court alleges that the damages for the entire class do not exceed $5M and that the individual property damage and medical claims associated with the explosion do not exceed $50,000 each. No jury was requested due to the jurisdictional restrictions in state court to obtain a jury.

In order to establish the amount in controversy, Mosaic relied upon the Plaintiffs' Petition which states that there are 200 putative class members. Mosaic argued that the amount in controversy "for at least one plaintiff" exceeds $75,000.00 exclusive of interest and costs. Rather than make any effort to show that this action meets CAFA's jurisdictional minimum,

Mosaic instead relied upon Section 1332 (a) a general jurisdiction statute that is nonapplicable to class actions.

Mosaic erroneously averred that even though this litigation is a state court class action sought to be removed to federal court, it need not meet CAFA, and it suggested, however erroneously, that the amount in controversy for a class action is met, through 28 USC § 1332 (a), because attorneys' fees and costs that may be awarded under La. C.C.P. art. 595, in state court, may be attributable to the three named class representatives, which according to Mosaic rendered the amount in controversy on each of these claims in excess of $75,000 and thereby establishes jurisdiction over this class action.

The District Court adopted this rationale, citing, Grant v. Chevron Phillips Chemical Co., L.P., 309 F.3d 864 (5th Cir. 2002), seven times in a three page ruling.

The rationale of Grant is abrogated by the 2005 Acts ("**matter in controversy exceeds the sum or value of $5,000,000**").

Even if Grant were not abrogated, there is good cause to review that decision and its rationale, as discussed below.

Mosaic had the burden of proving that the aggregate value of this litigation is in excess of $5,000,000 and not that any class representative's claim is worth $75,000 by aggregating attorney fees with the claims of the class representatives.

Mosaic, attempting to shift its burden of proof on removal, argued that the Plaintiffs are required to enter into a stipulation as to the value of the case. The CAFA does not require such and the burden of proof, as shown above, on the jurisdictional amount is on Mosaic. Mosaic, itself, could have entered such a stipulation, but chose not to. Additionally, although it was not Petitioner's burden of proof, Petitioners offered discovery on the jurisdictional amount. Ex E.

Mosaic incorrectly averred that the present class action is for fear and fright, yet, the Petition clearly states that it is limited to property damage, fear and fright claims associated with the property claims and to those rare persons with personal injuries

associated with explosion. The putative class has not averred that breathing hydrogen or the products of its combustion are associated with damages or fear and fright.

Mosaic next averred that because the claims arise in St. James Parish that the Plaintiffs have thereby alleged that the entire Parish was damaged. Mosaic's characterization of the Petition is unfounded. The distance that the shock wave traveled through the ground and where it traveled is unknown at this time. Precertification discovery is necessary on this issue to properly define the class.

Next, despite Syngenta, infra, Mosaic argued that 28 USC § 1367 allows the District Court to exercise supplemental jurisdiction over this action, where another action removed to this Court may meet CAFA and where the two actions may be consolidated. The plain language of Section 1367 does not allow such.

Furthermore, in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), the United States Supreme Court rejected the suggestion that Section 1367 provides a basis for original jurisdiction. Discussing whether 28 USC § 1367 provides removal jurisdiction, the Supreme Court wrote, 123 S.Ct. at 370, as follows:

> They argue that respondent's maintenance of the Henson action undermined the Price settlement and that, in light of the Alabama court's retained jurisdiction, ancillary enforcement jurisdiction was necessary and appropriate. **But they fail to explain how the Alabama District Court's retention of jurisdiction over the Price settlement authorized *removal* of the Henson action. Removal is governed by statute, and invocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with statutory requirements.**

> Read in light of the question presented in the petition for certiorari, perhaps petitioners' argument is that ancillary jurisdiction authorizes removal under 28 USC § 1441. As we explained in Peacock, however, a "**court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims.**" 516 U.S., at 355, 116 S.Ct. 862. Ancillary jurisdiction, therefore, cannot provide the original jurisdiction that petitioners must show in order to qualify for removal under § 1441.
>
> Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. [Emphasis added]

Thus, Section 1367 does not provide a basis for removal jurisdiction.

According to the federal statute governing supplemental jurisdiction, even where this Court may have original jurisdiction over another related action arising out of the same transaction and occurrence, and where that jurisdiction is founded on diversity (28 USC § 1332) and the actions are merely consolidated, the Court may not exercise original jurisdiction through 1367 over this action simply because of consolidation.

Thus, a district court must have original jurisdiction over the claims in each separate action.

Specifically, 28 USC § 1367 (b) provides in pertinent part:

> **In any civil action of which the district courts have original jurisdiction** founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as

plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Thus, Section 1367 does not provide a basis for original or removal jurisdiction.

Where Mosaic failed to meet its burden of proof under CAFA, this Court should review, render and remand this action to state court.

Issue: *May a state statute vest a federal district court with subject matter jurisdiction?*

The United States Supreme Court has answered this question, and the answer is "No."

This Court has never considered the affect of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), on Grant.

Syngenta involved a state court products liability action which was removed to the Middle District of Louisiana and then transferred to the Southern District of Alabama where a national settlement was pending. As a basis for original subject matter jurisdiction the transferror court relied upon the All Writs Act and Supplemental Jurisdiction to exercise federal subject matter jurisdiction over the action. The decision of the Eleventh Circuit to reverse and remand was affirmed by the Supreme Court, which, through Chief Justice Rehnquist, wrote, 123 S.Ct. at 369:

> The court [Eleventh Circuit] reasoned that § 1441 by its terms authorizes removal only of actions **over which the district courts have original jurisdiction.**

The Supreme Court further explained, 123 S.Ct. at 370, as follows:

> The general removal statute, 28 USC § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending," **unless Congress specifically provides otherwise.** § 1441 (a). **Under the plain terms of § 1441 (a), in order properly to remove the Henson action pursuant to that provision, petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts**. They concede that **the All Writs Act "does not, by its specific terms, provide federal courts with an independent grant of jurisdiction."** Brief for Petitioners 9; see also Clinton, 526 U.S., at 534-535, 119 S.Ct. 1538 (express terms of the All Writs Act confine a court "to issuing process 'in aid of its existing statutory jurisdiction; the Act does not enlarge that jurisdiction"). **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.** [Emphasis added]

If the All Writs Act does not qualify as an Act of Congress that vests original jurisdiction in the federal courts, *a fortiori*, La. C.C.P. art. 591, *et seq.*, cannot.

Here, since the Louisiana Class Action Statutes La. C.C.P. art. 591, *et seq.*, neither can, nor does,

provide federal courts with an independent grant of subject matter jurisdiction, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.[1] "Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court." Syngenta, 123 S.Ct. at 371. Syngenta is clear that § 1441 cannot provide original jurisdiction to an action which could not have been originally instituted in a federal court. Although a court may look at the value of the action at the time of removal, it must determine the value of the case under federal law **as though the action had been originally filed in a federal district court**.

A federal district court would have had no subject matter jurisdiction over this action had it been originally filed in federal court, because the claim of each named Plaintiff did not meet the jurisdictional minimum and the Plaintiffs could not have invoking a Louisiana procedural statute as a basis to vest the federal court with subject matter jurisdiction. According to Syngenta, if the case could not have been originally filed in federal court, such a case cannot be removed to federal court. To the extent Grant was not abrogated by CAFA, Grant should be reconsidered in light of Syngenta and La. C.C.P. art. 4.

The Supreme Court's analysis set forth in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (**11/5/02**), should not be ignored in this case, simply because the Supreme Court did not discuss Grant v. Chevron, 309 F.3d 864 (5th Cir. **10/11/02**), which decision **predates** Syngenta **by one month**. The rendering of Grant and Syngenta is near contemporaneous and neither case mentions the other. Additionally, although the Supreme Court makes no mention of

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[1] "The third article of the Constitution declares that 'the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish.'" Sheldon v. Sill, 8 How. 441, 12 L.Ed. 1147 (U.S. 1850).

Grant, Syngenta still impacts this action,[2] because Syngenta redirects the analysis of removed actions.

Through Grant, this Fifth Circuit instructed its district courts to determine the amount in controversy at the time of removal, i.e., **what was the value of the case while in state court?** To assess the value of a Louisiana class action, while it was in state court, in Grant, this Fifth Circuit relied upon a Louisiana procedural article, **which, once the action was in federal court, may no longer be applied.** According to Syngenta, if the state court procedural statute would not apply had the action been originally filed in federal court, it will not apply to a district court's analysis of subject matter jurisdiction on removal. Such is the case with La. C.C.P. art. 591, et seq.

Through Syngenta, the Supreme Court instructed that the proper analysis for district courts to follow is whether at the time of removal the action could have been originally filed in a federal district court. The proper question, thus, is **what is the value of the case if it had been originally filed in federal court?**

Syngenta directs the district courts make a determination of subject matter jurisdiction with the assumption that the action had been originally filed in federal court.

The greater issue, raised by Syngenta's implicit impact on this case, is whether Grant vests the Louisiana Legislature with the authority under the United States Constitution to enact procedural statutes that vest federal district courts with original subject matter jurisdiction. If Louisiana's procedural statutes in any manner govern an action for diversity purposes once in federal court, then the federal district courts would also be bound by Louisiana's subject matter jurisdictional statutes, including La. C.C.P. art. 4, which provides as follows:

> When the jurisdiction of a court

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[2] There is neither a Supreme Court nor Fifth Circuit rule which states that to impact an earlier decision of a lower court, the decision of a higher court must specifically discuss or mention that case.

> over the subject matter of an action depends upon the amount in dispute, or value of the right asserted, it shall be determined by the amount demanded, including damages pursuant to Civil Code Articles 2315.3 and 2315.4, or value asserted in good faith by the plaintiff, **but the amount in dispute does not include interest, court costs, attorney fees, or penalties, whether provided by agreement or by law.**

Thus, if it were constitutionally permissible for a federal district court to look to a Louisiana procedural statute as a basis to determine the value of a case (**while it was in state court**) for the purposes of original federal diversity jurisdiction, according to Louisiana law on subject matter jurisdiction, the award of attorney fees or costs to the class representatives **may not** be considered when determining the value of the case.

But, the more interesting point raised by La. C.C.P. art. 4 is the contrast in questions posed by Grant (**what was the value of the case while in state court?**) and by Syngenta (**what is the value of the case in federal court?**), because according to Article 4, a Louisiana State Court could not consider La. C.C.P. art. 595 in determining the value of a case.

Implicitly, this Court's analysis in Grant grants the Louisiana Legislature a power vested in Congress. What if the Louisiana Legislature amended La. C.C.P. art. 4 to provide that any cases filed in the State of Louisiana district court against a foreign defendant will be presumed to be valued greater than 75,000.00? Would every Louisiana case involving a foreign defendant be removable? Under Grant, the answer is yes. Under Syngenta, the answer is no, because a state statute cannot vest a federal court with subject matter jurisdiction. At this point, the constitutional underpinnings of the Syngenta analysis trump that of Grant.

In Syngenta, the Supreme Court found that since the All Writs Act was not a specific grant, by Congress, of original subject matter jurisdiction to the federal district court, the All Writs Act could not be

used as a basis for jurisdiction on removal pursuant to § 1441. Here, certainly, Louisiana's Class Action Statute cannot form a basis or vest a federal district courts with original subject matter jurisdiction. Thus, the analysis or approach utilized by this Fifth Circuit in Abbott should be reevaluated in light of Syngenta.

In Syngenta, the plaintiff could not have originally filed his action in federal court and pled the All Writs Act or Supplemental Jurisdiction to vest the federal district court with original subject matter jurisdiction. Explaining, Chief Justice Renhnquist, wrote, 123 S.Ct. at 369:

> **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.**

Here, because a Louisiana law may never confer jurisdiction on a federal court, a Louisiana law cannot confer original jurisdiction required to support removal.[3] Again, **if the Plaintiffs could not have filed a complaint and pled Louisiana Procedural Statutes as a basis to vest the federal district court with original subject matter jurisdiction, then the statute cannot support removal.**

If the All Writs Act cannot form a basis for original jurisdiction, then, *a fortiori*, a state statute may never do so.

In view of Syngenta, Grant is an unprecedented and unconstitutional grant of power to the Louisiana Legislature.

The final question before this Court is, if Grant correctly found that the proper inquiry is what was the value while in state court and that Louisiana class action statute created a substantive right vested in a

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[3] Because this is a diversity case, the Rules of Decision Act, 28 U.S.C. § 1652, and Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 822-23, 82 L.Ed. 1188 (1938), with its seeming constitutional underpinning, mandate that the substantive law applied be that of the relevant state, and procedural rules of the federal courts, apply.

class representative, what happens to subject jurisdiction once class certification is denied by a federal court?

There would no longer be any claim for attorney fees to cumulate to any class representative to meet any jurisdictional minimum for any claim. Subject matter jurisdiction cannot be illusory.

Even in Grant, 309 F.3d at 873, the Fifth Circuit reiterated that "Abbott[4] confirms that **when** the federal court **has jurisdiction over at least one member of the class** by virtue of (1) diversity of citizenship and (2) a sufficient jurisdictional amount, that court has supplemental jurisdiction over all diverse class members, including those whose claims fall short of § 1332's amount-in-controversy threshold." Thus, where subject matter jurisdiction is illusory (based solely upon a state procedural statute that will not apply in federal court), remand/dismissal is inevitable.

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[4] Referencing, Free v. Abbott Laboratories, 164 F.2d 270 (5th Cir. 1999), aff'd by equally divided court, 529 U.S. 333, 120 S.Ct. 1578 (2000).

According to Grant, in an action filed as a Louisiana class action, the class representatives "may" have what the Court described as a "discretionary" substantive right to cumulate attorney fees and cost in their recovery, thus increasing the value of their claims. According to Grant, this substantive right is not extinguished on removal and when the action is certified under FRCP 23, the right is maintained.

Once a district court finds that class certification under FRCP 23 is improper and denies class certification, the right, *vel non*, recognized by Grant is extinguished. Once the right to cumulate attorney fees and costs in the claim of a class representative is extinguished, then the value of those claim(s) must independently meet the jurisdictional minimum under Acts of Congress relating to federal subject matter jurisdiction. If, other than the Louisiana Class Action statute, there is no independent basis for diversity jurisdiction, once class certification is denied, the action should be remanded. 28 USC Section 1447 (c). Such analysis demonstrates the error of applying Grant to this case.

The federal courts lack jurisdiction over this action.

"If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot stand. 'Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated.'" H&D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000), quoting, Caterpillar Inc. v. Lewis, 519 U.S. 61, 76-77 (1996).

Here, when the District Court elected to disregard Section 1453 and 1332 (d), the District Court further erred when it failed to analyze subject matter jurisdiction as though this action had been originally filed in a federal district court. This action should be remanded.

CONCLUSION

The *Order and Reasons* of the trial court is clearly erroneous and contrary to law. This action should be remanded to state court.

Respectfully submitted:

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FORM 6: CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

1. This brief complies with the type-volume limitation of Fed.R. App. P. 32 (a)(7)(B) because this brief contains 5,630 words not excluding the parts of the brief exempted by Fed. R. App. 32 (a)(7)(B)(iii).
2. This brief complies with the typeface requirement of Fed.R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in proportionally spaced typeface using Word Perfect 5.1 in a scaleable 14 pt. font called CG scaleable.

Baton Rouge, Louisiana, this 5th day of April, 2007.

S/_____
Donna U. Grodner

CERTIFICATE

I hereby certify that I have caused the above and foregoing to be served by facsimile on counsel of record as listed below at the numbers listed below and by U.S. Mail first class to the Honorable Judge Mary Ann Vial Lemmon, U.S.D.C. E.D.La. this 5 day of April, 2007.

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA
FLORENCE HARVEY ET AL.CIVIL ACTION
VERSUSNO: 06-9510
MOSAIC FERTILIZER, LX.C.SECTION: "S" (5)

ORDER AND REASONS

IT IS HEREBY ORDERED that the motion to remand of Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert is DENIED. (Document #7.)

I. BACKGROUND

Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert filed a "Class Action Petition for Damages" in the 23rd Judicial District Court for the Parish of St. James, State of Louisiana, against Mosaic Fertilizer, L.L.C. a/k/a Mosaic Faustina Fertilizer Plant (Mosaic or Faustina), on behalf of themselves and others similarly situated in sustaining damage as a result of an explosion and release of hazardous substances from the Mosaic facility in St. James Parish. On October 11, 2006, workers at the Faustina facility were processing product when hydrogen gas leaked and ignited. The plaintiffs allege a claim of negligence for the acts of others, pursuant to La. Civil Code art. 2317.

Mosaic, a Delaware corporation with its principal place of business in Florida, removed
the case to federal court, asserting diversity jurisdiction.1 The plaintiffs filed a motion to remand the case to state court.

II. DISCUSSION

Mosaic contends that the amount in controversy for at least one plaintiff exceeds $75,000.2

Motions to remand to state court are governed by 28 U.S.C. § 1447(c), which provides in relevant part: "If at any time before the final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." "District courts have original jurisdiction over civil actions where the amount in controversy exceeds $75,000, and there is diversity between all parties." Luckett v. Delta Airlines. Inc.. 171 F.3d 295, 298 (5th Cir. 1999). Under Louisiana law, a plaintiff is prohibited, except in circumstances not relevant here, from alleging a specific dollar amount of damages. Grant v. Chevron Phillips Chemical Co.. L.P- 309 F.3d 864, 868 (5th Cir. 2002). However, the plaintiff may recover an award in damages

more than he demands. Id. at 869. In such situations, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. Id. at 868. "The removing party may satisfy this burden in either of two ways: "(1) by demonstrating that it is 'facially apparent' from the petition that the claim likely exceeds $75,000 or (2) by setting forth the facts in controversy-preferably in the removal petition, but sometimes by affidavit-that support a finding of the requisite amount." Id.

In Louisiana cases, "the federal district court's jurisdictional-amount calculus must include attorney's fees when an applicable Louisiana statute allows the award of such fees. Id. All awardable attorney's fees in a class action3 are attributed to the class representatives to the exclusion of other members of the class. Id- at 870-71. "[Calculation of the anticipated recovery of the class representatives-the only one that matters for purposes of § 1332-must include those potential attorney's fees in addition to damages." Id. at 873.

It is facially apparent from the petition that the claim of at least one named plaintiff is likely to exceed $75,000. Harvey alleges that she was at home in her trailer when the explosion occurred. The explosion rocked her trailer and caused her such fear and surprise that she required emergency medical treatment for "uncontrolled" blood pressure and pulse. One of the concrete piers supporting her trailer is askew. Gauthreaux became afraid when he heard the explosion, which caused a large window in his home to break and other damage. The Alberts were at home when the explosion occurred. They allege damage to their home, including a cracked driveway and cracked living room floor, and personal fear and fright. When awardable attorney's fees are attributed to Harvey, Gauthreaux, and the Alberts in calculating the amount in controversy, any one of their claims likely exceeds the jurisdictional threshold. Moreover, the plaintiffs have not filed stipulations or affidavits of the parties or counsel that their claims fall available, or a recovery or compromise is had which is beneficial, to the class which is below the jurisdictional amount.

Accordingly, there is diversity jurisdiction, and the motion to remand is denied.

New Orleans, Louisiana, this 19th day of March, 2007.

S/

ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FLORENCE HARVEY ET A;	CIVIL ACTION
VERSUS	NO. 06-9510
MOSAIC FERTILIZER, LLC	SECTION: "S" (1)

The record reflects that a Notice of Removal has been filed in the captioned case; accordingly,

Pursuant to 28 USC 1447(b), the removing party is directed to file within 10 days:

1) A list of all parties still remaining in this action;
2) Copies of all pleadings, including answers, filed by those parties in the state court; and
3) Copies of the return on service of process on those parties filed in state court.

New Orleans, Louisiana, November 6, 2006
By Direction of the Court
Loretta G. White

Case No.: 2:06-cv-09510 MVL-SS
Document 2
Filed 11/06/2006

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY, ET AL CA NO: 06-9510
VS. JUDGE: SECTION "S"
MOSAIC FERTILIZER, LLC MAGISTRATE JUDGE:

NOTICE OF REMOVAL

Mosaic Fertilizer, LLC ("Mosaic"), removes to this Court the captioned action on the following grounds:

1.

On or about October 12, 2006, 2006, suit was filed against Mosaic in the 23rd Judicial District Court, Parish of St. James, State of Louisiana, bearing docket number 31350, and entitled *Florence Harvey; Ulysses Gauthreaux; Lionel and Ernestine Albert; and All Other Similarly Situated Persons vs. Mosaic Fertilizer, LLC.*

2.

Plaintiffs filed this action as "a class action pursuant to La. C.C.P. art. 591, individually and on behalf of all other similarly situated persons" consisting "of all persons who or which on October 12,2006, [sic] were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant." [Petition, Introductory Paragraph and Paragraph 9).

3.

The United States District Court for the Eastern District of Louisiana is, pursuant to 28 U.S. C. §1391 and §1446(a), a court of proper venue because the removed action was originally filed in a Louisiana state court situated in St. Janies Parish, and the alleged events giving rise to the claims occurred in the Eastern District of Louisiana.

4.

This is a civil action over which this Court has original subjectmatter jurisdiction under 28 U.S.C. §] 332 because; (a) it is acivil action involving citizens ofdifferent states and the amount in controversy

exceeds Seventy-Five Thousand Dollars (575,000), exclusive of interest and costs; and (b) it is a class action involving citizens ofdifferent states and the amount in controversy exceeds Five Million Dollars ($5,000,000), exclusive of interest and costs.

Diversity of Citizenship Jurisdiction Under 28 U.S.C. $1332fa)

5.

This Court has subjectmatter jurisdiction over this action pursuant to 28 U ,S .C. § 1332(a), because complete diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

6.

Plaintiffs are alleged to be domiciled in St. James Parish, Louisiana. [Petition, Paragraph 1].

7.

Mosaic Fertilizer, LLC is a Delaware corporation with its principal place of business in Florida.

8.

Thus, complete diversity of citizenship exists.

9.

In light of the allegations of the complaint, defendants show that the amount in controversy for the claims of at least one plaintiff exceeds S753000, exclusive of interest and costs.

10.

The amount in controversy requirement is easily satisfied here. Although plaintiffs alleged their claims "are not in excess of $50,000," [Petition, Paragraph 1], such allegation is not sufficient to preclude federal diversity jurisdiction under 28 U.S.C. §1332. First, plaintiffs claim that on October 11,2006, a "large explosion" occurred "when hydrogen gas leaked out of the pipe and came into contact with an ignition source." [Petition, Paragraph 7]. The explosion allegedly "shook homes and caused vibrations that started [sic] individuals and caused property damages." [Petition, Paragraph 8]. Specifically, theplaintiffs claim they suffered both fear and fiight and property damages from the shock of the explosion, such as movement of concrete piers, breakage of windows, cracked driveways and cracked floor tiles.

[Petition, Paragraphs 2 - 4]. All of the plaintiffs heard and felt the explosion. [Petition, Paragraphs 2-4]. The explosion was of such magnitude that Ms. Harvey'sblood pressure and pulse became uncontrolled, requiring emergency medical treatment. [Petition, Paragraph 2].

11.

Second, because this case is filed as a class action on behalf of at least 200 area residents [Petition, P aragraph 12], the amount in controversy includes reasonable expenses, including attorneys' fees awarded under La. C.C.P. Art. 595, attributable to the class representative(s). Third, plaintiffs have not and cannot enter into an irrevocable stipulation binding on all proposed class members waiving or foregoing damages in excess of the jurisdictional minimum for each and every proposed class member.

12.

Therefore, the amount in controversy on the claim of at least one plaintiff, on the face of the pleadings, is above $75,000.

13.

Additionally, pursuant to 28 U.S.C. § 1367(a), this Court may and should exercise supplemental jurisdiction over the claims of all plaintiffs and putative class members.

14.

Consequently, this Court has jurisdiction under 28 U.S.C. §1332(a). Class Action Fairness Act ("CAFA") Jurisdiction under 28 U.S.C. §1332fd)

15.

This Court also has subject matter jurisdiction over all claims asserted against defendants, regardless of their citizenship, pursuant to the Class Action Fairness Act ("CAP A"), 28 U.S.C. § 13 3 2(d), and removal jurisdiction under § 1441(a) and (b), and § 1453. CAFA applies because this action is a purported class action in which the claims of the proposed class exceed the sum or value of $5^00,000; theputative class contains at least 100 class members; and aplaintiff isacitizenofa state different from a defendant.

16.

First, this suit satisfies the requirement under CAFA that a member of the putative class is a citizen

of a state different from that of any defendant. The plaintiffs are alleged to be domiciled in St. James Parish, Louisiana. Mosaic Fertilizer, LLC is a Delaware corporation with its principal place ofbusiness in Florida. Therefore, the minimal diversity requirement under CAFA is met. See 28 U.S.C. §1332(d)(2)(A).

17.

Second, the proposed class is estimated "to be at least two hundred and so numerous as to make joinder of all of them impracticable." [Petition, Paragraph 12]. Therefore, the requirement that the putative class contain at least 100 class members is met on. the face of the petition.

18.

Third, the sum or value of the putative class claims exceeds $5,000,000, based on the allegations of the petition. CAFA applies if the sum or value of the claims of the putative class in the aggregate exceeds $5,000,000. 28U.S.C. §2332(d)(2). According to the plaintiffs, "the actual number of persons who or which will elect to maintain their claims through this litigation will be better established after notification to all putative class members that thi s action is pending." [Petition, Paragraph 13]. Plaintiffs allege that the claims of the named plaintiffs, who all heard, felt, were frightened or surprised by the explosion, and suffered properly damage, are typical of the class. [Petition, Paragraph 11]. Plaintiffs have moved for class certification, asserting the class is "all persons located or employed in the community of St. James and the surrounding area who sustained property damages, personal injuries, emotional, mental, economic or nuisance damages as a result of the incident on October 12,2006, [si c] and who claim legally compensable damages. [P laintiffs' Motion and Incorporated Memorandum in Support to Certify a Class Action, Paragraph 2]. Plaintiffs1 petition similarly proposes the class of persons who' 'werepresent and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/orminormedical treatment as are suit" of the explosion on October 11,2006.

19.

According to the 2000 census, the total population of St, James Parish is 21,216. If the population contains 5,000 class members, then the class claims need only amount to $1,000 each for the $5,000,000 threshold to be met. If the class has 2,500 members, the class members' claimed damages need only amount to $2,000 each for the $5,000,000 threshold to be met. Considering the alleged geographic area of the class as the communities surrounding the Mosaic Fertilizer, LLC site in St. James P arish, and the alleged nature of the damages as physical, mental, and property damage experienced bypersons and businesses, theputative class members' claims in the aggregate, plus attorneys' fees attributed to the plaintiffs' claims, could easily exceed the $5,000,000 threshold. Again, plaintiffs have not and cannot enter an irrevocable stipulation binding on all proposed class members waiving or foregoing damages in excess of the jurisdictional minimum for each and every proposed class member.

20.

Consequently, this Courthas jurisdiction under28 U.S.C. §1332(d). The conditions set forth in 28 U.S.C. §1332(d)(3) and § 1332(d)(4) that would require the Court to decline jurisdiction are not present in this case.

21.

Alternatively, pursuant to 2 8 U.S.C. § 1367, this Court should exercise supplemental jurisdiction over this action. The plaintiffs in this action are putative class members in the first-filed class action, Vivian Folse, etal v.MosaicFertilizer, LLC, No. 31344, originally filed in the 23rd Judicial District Court ("the Folse class action") and removed to the United States District Court for the Eastern District of Loui siana simultaneously herewith. TheFolse class action is alleged to include "all persons and entities located or residing in the Parish of St. James who sustained personal, mental, emotional and ecoaomic damages and/or inconvenience as a result of the explosion and release of hazardous substances at the Mosaic Fertilizer, LLC facility which occurred on October 11, 2006." [Folse class action Petition, Paragraph XIII].

22.

Because this case and theFolse class action, contain the same claims and allege the sameclass, they form thesame case or controversy under §1367(a). Sustaining these cases as two separate actions would amount to allowingthese named plaintiffs to opt out of the class before class certification or notice to the class members. Putative class members have no automaticright to opt out under Federal Rule 23. Accordingly, this Court should exercise jurisdiction over the claims of these additional plaintiffs as part of the Folse class action pending before this Court, and allow the transfer and consolidation of this case with the Folse class action.

23.

Mosaic Fertilizer, LLC was served on October 24,2006. This Notice of Removal isbeingtimely filed within thirty (30) days of service.

24.

Since the only named defendant is Mosaic, no other party needs to consent to this removal.

25.

Mosaic attaches to this Notice of Removal a copy of all process, pleadings and orders served upon it in the state court proceedings. See 28 U.S.C. §1446(a).

WHEREFORE, Mosaic Fertilizer, LLC, requests that this Court assume fall jurisdiction over this matter as provided by law.

Respectfully Submitted,

Charles S\McCowan, Jr. (#9167)
Vance A. Gibbs (#1375)
Glenn M. Farnet (#20185)
Mark A. Marionneaux (#21743)
Lana D. Crump (#23707)
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Attorneys for Mosaic Fertilizer, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Notice of Removal has been mailed, postage prepaid to the following:

Denise A. Vinet
VINET & VINET
11817 Bricksome Avenue, Suite A
Baton Rouge, Louisiana 70816

Robert J. Snyder Attorney at Law
837 North Pine Street
Gramercy, Louisiana 70052

Donna U. Grodner
GRODNER & ASSOCIATES
2223 Quail Run, B-1
Baton Rouge, Louisiana 70808

Baton Rouge, Louisiana this 3rd of November, 2006.

S/

Case 2:06-cv-095
Filed 11/06/2006
Eastern District of Louisiana

CT CORPORATION
Service of Process Transmittal 10042006
Log Number: 51156836S

TO: Dense Clarke
The Mosaic Company
Atria Corporate Center, Suite E45Q, 3033
Campus Drive
Plymouth, MM, 55441
RE: Process Served in Louisiana
FOR: Mosaic Fertilizer, LLC (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Florence Harvey, ET AL Pltfs. Vs. Mosaic Fertilizer Inc., LLC, Def.
DOCUMENT SERVED:	Citation, Petition, Motion and Memorandum
COURT AGENCY:	23RD JDC, Parish of St. James, Case No.: 31350
NATURE OF ACTION:	Personal injury - Property damage - on 10/11/06 Due to explosion at the Mosaic Faustina Facility
ON WHOM PROCESS WAS SERVED:	CT Corporation System, BR, LA
DATE AND HOUR OF SERVICE:	By Process server on 10/24/2006 at 9am
APPEARANCE OR ANSWER DUE:	Within 15 days

Attonrey(s)/Senders:	Denise A. Vinet Vinet & Vinet 11817 Bricksome Ave., A Baton Rouge, LA 70816 225-292-7410

ACTION ITEM: SOP Papers
with Transmittal, via Fed Ex 2 Day 790100656282

SIGNED:	CT Corporation System
PER:	Parrish, Ritchie
ADDRESS:	8550 United Plaza Blvd Baton Rouge, LA 70809
TELEPHONE:	225-922-4490

CITATION

HARVEY, FLORENCE No: 00000031350 Div: B

VERSUS 23rd Judicial District Court

MOSAIC FERTILIZER LLC
PARISH OF ST. JAMES State of Louisiana

TO: MOSAIC FERTILIZER, LLC
THROUGH ITS REGISTERED AGENT FOR SERVICE OF PROCESS:
C.T. CORPORATIOH SYSTEM, E550 UNITED PLAZA BLVD.
BATON ROUGE, LA. 70809

YOU ARE HEREBY SUMMONED to comply with the demand contained in the accompanying petition FOR DAMAGES

a true and faithful copy whereof accompanies this citation, or to make an appearance by filing an answer or other pleading thereof, in writing, with the Clerk of the Twenty-Third Judicial District Court of the State of Louisiana in and for the Parish, of St. James, at his office in the Court house in the Parish and State aforesaid, within FIFTEEN (15) DAYS after the service hereof. Your failure to comply herewith will subject you to the penalty of entry of default judgment against you.

WITNESS the Honorable Judges of the 23rd Judicial District in and for the Parish of St. James, State of Louisiana, this 13TH day of OCTOBER , 2006.

EDMOND E. KINLER, JR.
CLERK OF COURT
P.O. BOX 63
CONVENT, LA. 7 0723
225-5G2-2270 (TEL)
225-562-2333 (FAX)

S/
DEPUTY CLERK OF COURT
(Service Copy)

Florence Harvey	NO. 31,350 Division B et al
Versus	23rd Judical District Court
Mosaic Fertilizer	ST James Parish
	State of Louisiana

CLASS ACTION PETITION FOR DAMAGES

Now into Court, through undersigned counsel, come plaintiffs, pursuant to La. C.C.P. art. 591, individually and on behalf of all other similarly situated persons, who respectfully represent that they and all other similarly situated persons have sustained compensable damages caused by the acts and omissions of Mosaic Faustina Fertilizer Plant is legally responsible, as follows:

1.PARTIES

PLAINTIFFS:

The plaintiffs are Florence Harvey, Ulysses Gauthreaux, Lionel and Ernestine Albert, both majors domiciled in St. James, St. James Parish, Louisiana, who was present and resides/resided in the effected vicinage of the St. James on October 11, 2006, and who claims legally compensable damages arising out of the 8:15 p.m. explosion at the Faustina Plant which caused legally compensable damages, which damages to the individual class members are not in excess of $50,000 and which class action damages as a whole will not exceed $5M.

2.

Ms. Harvey was home in her trailer when the explosion occurred rocking her trailer and causing her such fear and surprise that her blood pressure and pulse became uncontrolled. Ms. Harvey required emergency medical treatment. One of the concrete piers supporting her trailer is now askew. Ms. Harvey claims property damage and fear and fright and emergency medical treatment.

3.

Mr. Gauthreaux was home when the explosion occurred which he felt. Although he is hard of hearing, Mr. Gauthreaux heard the explosion which broke a large window in his home and caused other damages. Mr. Gauthreaux claims fear and fright and property damage.

4.

The Alberts were home when the explosion occurred which they felt. Their home was damaged with

cracked driveway, cracked tile on living room floor and other property damage. They claim fear and fright and property damage.

5.

DEFENDANTS:

The defendant, Mosaic Fertilizer, LLC., a/k/a Mosaic Faustina Fertilizer Plant on La -18 in St. James Parish is a Delaware corporation doing business at 99959 Hwy 18, in St. James, Louisiana, and who is amendable to service of process through CT Corporation System, 8550 United Plaza Blvd, Baton Rouge, La 70809.

6.

FACTS

The Mosaic Faustina facility is located in St. James, Louisiana, on the west side of the Mississippi River just across the Sunshine Bridge.

7.

On or about October 11, 2006, workers at Faustina Facility were processing product when hydrogen gas leaked out of pipe and came into contact with an ignition source resulting in a large explosion.

8.

The explosion shook homes and caused vibrations that started individuals and caused property damages.

9.

THE CLASS:

The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

10.

The class seeks certification of the issue of fault.

11.

The claims of the proposed class representatives are typical of a cross section of the class and of the claims they seek to represent.

12.

The number of area residents effected by the explosion are estimated to be at least two hundred and so numerous as to make joinder of all of them

impracticable.

13.

The actual number of persons who or which will elect to maintain their claims through this litigation will be better established after notification to all putative class members that this action is pending.

14.

Most if not all of the injuries complained of herein were suffered within the jurisdiction of this Court.

15.

The questions of law and fact arising out of claims made by the plaintiffs herein, individually, and on behalf of the proposed class are common and include but are not limited to establishing the allegations of facts found below, which are common to the proposed class.

16.

At the time of the explosion, Mosaic Fertilizer, LLC, owned, operated, managed, and had custody and/or control of the facility pursuant to La. C.C. arts. 2317 and/or 2322.

17.

The events described herein do not generally occur in the absence of negligence. Plaintiffs specifically plead the doctrine of *res ipsa loquitur* and assert that the only explanation for what happened is that Mosaic Fertilizer committed a negligent act or omission.

18.

The above described acts and omission of Mosaic Fertilizer constitute a wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

19.

CLASS ACTION IS SUPERIOR:

Many of the witnesses and much of the evidence supporting plaintiffs' claims may be found within the jurisdiction of this Court.

20.

Concentrating this litigation in one forum will aid with judicial economy and efficiency and promote parity among the claims of individual class members as well as judicial consistency.

21.

Plaintiffs will fairly and adequately represent and protect the interest of all members of the described class.

Plaintiffs have retained attorneys highly experienced in the prosecution of class actions, including complex product liability litigation, and mass accident class actions, to represent the class members herein.

22.

The common facts to be established herein are applicable to certain theories of law, which validate the liability of Mosaic Fertilizer to the class.

23.

A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members of the class is impracticable. Where most of the claims to be asserted herein are small, even if each class members could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed.

24.

Individual litigation magnifies the delay and expense to all parties in the court system in the resolution of the controversies engendered by defendant. By contrast, the class action device presents far and fewer management difficulties and provides the benefits of unitary adjudication, economies of skill, and effort, comprehensive supervision by a single court.

25.

Accordingly, class certification is appropriate under Louisiana Code of Civil Procedure articles 591, et. seq., and the class action vehicle is the superior method for handling this litigation.

WHEREFORE plaintiffs on behalf of themselves and all those similarly situated pray that defendant, Mosaic Fertilizer be cited to appear and answer for the wrongs to plaintiffs and to all others similarly situated as described herein, that this action be certified for class action proceedings, that plaintiffs be properly noticed of all hearings and dates, and that after due proceedings herein that defendant be cast in judgment unto plaintiffs for damages, cost, interest, and attorney fees as may be allowed by law under any theory of law as expressly pled herein or as may be applicable to the facts pled herein or as they may develop and be presented during the trial of this matter.

Respectfully submitted:

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Robert J. Snyder (26722)
Attorney at Law
2122 B. West Main St
Lutcher, La. 70771
(225) 869-6600 FAX 869.7148

SERVICE INFORMATION:
Mosaic Fertilizer, LLC
THROUGH ITS REGISTERED AGENT FOR SERVICE OF PROCESS
C.T. Corporation System
8550 United Plaza Blvd.
Baton Rouge, La. 70809

Filed: October 12, 2006
Suit Number 31,350
Parish of St. James
23rd JDC

Florence Harvey	NO. 31,350 Division B et al
Versus	23rd Judical District Court
Mosaic Fertilizer	ST James Parish
	State of Louisiana

PLAINTIFFS' MOTION AND INCORPORATED MEMORANDUM IN SUPPORT TO CERTIFY A CLASS ACTION

NOW INTO COURT, through undersigned counsel, come Plaintiffs, who respectfully represent that they and all similarly situated persons have sustained compensable damages caused by the acts and omissions of Mosaic Fertilizer, LLC and other such parties as may be identified during discovery, or for which Mosaic is legally responsible, who respectfully move this Court to certify the issue of fault for class action treatment pursuant to La. C.C.P. Article 591, et seq. Until a more precise determination is made of the geographical area affected by the release, petitioners allege that:

1.

Pursuant to La. C.C.P. art. 591 (A) and 592 (A) this action may be certified as a class defined as follows: THE CLASS:

The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

2.

The class consists of all persons located or employed in the community of St. James and the surrounding area who sustained property damages, personal injuries, emotional, mental, economic or nuisance damages as a result of the incident on October 12, 2006, and who claim legally compensable damages.

3.

The parties intend to submit a joint case management order to the court, which may allow for pre hearing discovery and other proceedings related to class certification including a briefing schedule. A hearing need not be set at this time.

4.

Pursuant to La. C.C.P. art. 592 a motion to certify

may be filed within ninety days of service on all adverse parties.

5.

Plaintiff herein as representatives of a class seek to have this litigation certified for class action proceedings based on the incident described herein.

6.

Persons proposed to be class representatives may be identified pursuant to La. C.C.P. art 592 (A)(3)(ii) and a proposed *Case Management Order* (*CMO*) sought to be entered pursuant to joint motion.

7.

The claims of the proposed class representatives, to be announced in subsequent pleadings, shall be typical of a cross section of the class and of the claims they seek to represent.

8.

The number of area residents effected by the emission are estimated to be at least one thousand and so numerous as to make joinder of all of them impracticable.

9.

The actual number of persons who or which will elect to maintain their claims through this litigation will be better established after notification to all putative class members that this action is pending.

10.

Most if not all of the injuries complained of herein were suffered within the jurisdiction of this Court.

11.

The questions of law and fact arising out of claims made by the plaintiffs herein, individually, and on behalf of the proposed class are common and include but are not limited to establishing the allegations of facts found below, which are common to the proposed class.

12.

The cause of the release is presently unknown; however, sufficient information regarding the levels of hydrogen fluoride or other toxic substance released into the air are presently under discovery.

13.

The evidence and facts necessary to answer these questions are common to all claims of all actions filed to date.

14.

With regard to liability for the release, common questions of law and fact are present.

15.

When a "common character" of rights exists, a class action is superior to other available adjudicatory methods for the purpose of promoting the basic aims and goals of a procedural device:

1. effectuating substantive law;
2. judicial efficiency; and
3. individual fairness.

16.

A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members of the class is impracticable. Where most of the claims to be asserted herein are small, even if each class members could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed.

17.

Individual litigation magnifies the delay and expense to all parties in the court system in the resolution of the controversies engendered by defendant. By contrast, the class action device presents far and fewer management difficulties and provides the benefits of unitary adjudication, economies of skill, and effort, comprehensive supervision by a single court.

18.

Accordingly, class certification is appropriate under Louisiana Code of Civil Procedure articles 591, et. seq., and the class action vehicle is the superior method for handling this litigation.

19.

CLASS ACTION IS SUPERIOR:

Many of the witnesses and much of the evidence supporting plaintiffs' claims may be found within the jurisdiction of this Court.

20.

Concentrating this litigation in one forum will aid with judicial economy and efficiency and promote parity among the claims of individual class members as well as judicial consistency.

21.

Plaintiffs will fairly and adequately represent and protect the interest of all members of the described class. Plaintiffs have retained attorneys highly experienced in the prosecution of class actions, including complex product liability litigation, and mass accident class actions, to represent the class members herein.

22.

The common facts to be established herein are applicable to certain theories of law, which validate the liability of defendant to the class.

23.

A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members of the class is impracticable. Where most of the claims to be asserted herein are small, even if each class members could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed.

24.

Individual litigation magnifies the delay and expense to all parties in the court system in the resolution of the controversies engendered by defendant. By contrast, the class action device presents far and fewer management difficulties and provides the benefits of unitary adjudication, economies of skill, and effort, comprehensive supervision by a single court.

25.

Accordingly, class certification is appropriate under Louisiana Code of Civil Procedure articles 591, et. seq., and the class action vehicle is the superior method for handling this litigation.

26.

The Defendant may deny and continue to deny any liability for any damages claimed by the class representatives.

27.

Importantly, notification that a class was certification would be relatively simple. A notice may be posted in the local community and it may be locally published. Additionally, the list of who was present in the vicinage may be obtained through relatively little expense by direct mail to the last known address of each

person.

28.

This action is proper for class action proceedings.

Wherefore, the parties pray that after a status conference herein that a *Case Management Order* be issued to facility discovery and a hearing be set at which time this Court may consideration of the evidence submitted that this Court certify a class, appoint the class representatives, define the class, issue class notice.

ORDER

CONSIDERING THE FOREGOING a status conference shall be held on the ___ day of _____, 2006, at ____ o'clock.

Signed in chambers this ___ day of _____, 2006, Convent, Louisiana.

Respectfully submitted:

S/_____
Denise A. Vinet (17185)
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S/_____
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S/_____
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SERVICE INFORMATION:
Mosaic Fertilizer, LLC
THROUGH ITS REGISTERED AGENT

FOR SERVICE OF PROCESS
C.T. Corporation System
8550 United Plaza Blvd.
Baton Rouge, La. 70809

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY	*CIVIL ACTION NO. 06-9510
ULYSSES GAUTHREAUX	*
LIONEL AND ERNESTINE	
ALBERT; AND	*SECTION: S-M1
ALL OTHER SIMILARLY	*
SITUATED PERSONS	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
	*MOSAIC FERTILIZER, LLC

* *

NOTICE OF HEARING ON
MOTION TO REMAND (WITH RESERVATION)

Please take notice of the hearing on the above and foregoing motion on the 24th day of January, 2006, at 10:00 a.m. at the Hale Boggs Federal Building located at 500 Camp Street in New Orleans, Louisiana.

Respectfully submitted:

_____
By Donna Grodner

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Lutcher, La. 70771
(225) 869-6600 FAX 869.7148

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served via U.S. mail and/or fax as indicated below to counsel of record this 26th day of

January, 2006.

S/
Donna Grodner

Charles S. McCowan, Jr.
Vance A. Gibbs
Glenn M. Farnet
Mark A. Marionneaux
Lana D. Crump
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY	*CIVIL ACTION NO. 06-9510
ULYSSES GAUTHREAUX	*
LIONEL AND ERNESTINE	
ALBERT; AND	*SECTION: S-M1
ALL OTHER SIMILARLY	*
SITUATED PERSONS	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
	*MOSAIC FERTILIZER, LLC

** * * *

the aggregate of the claims for property damages, fear and fright associated with property damages and minor medical treatment claims exceed $5M.

6.

Movants are without a basis in fact to justify a belief in Mosaic's averment of jurisdiction. Movants do not wish to make any representations to this Court about the extent of the explosion and property damages caused thereby in the absence of discovery on this issue.

7.

Should discovery indicate whether there is a good faith basis for the movants to represent that the aggregate value of the claims exceeds $5M herein, Movants will amend their complaint/petition regarding the jurisdictional amount in controversy.

8.

The discovery that the movants seek to propound is limited to subjection matter jurisdiction and the amount of property damages and personal injury damages caused by the explosion.

9.

Movants seek leave of ULLR 23.1 (B) (90 days to file a motion) to move for certification on the basis that subject matter jurisdiction should be resolved prior to any other action or proceedings before this Court to conserve judicial efficiency and economy.

10.

Movants seek to reserve their right to amend this motion to remand pending discovery on the jurisdiction amount in controversy.

WHEREFORE movants pray that they be allowed to take discovery on the jurisdictional amount, that they be given leave to file a motion to certify a class once the jurisdictional issue is resolved and that they be allowed to amend this motion to remand pending discovery on the jurisdictional amount in controversy.

Respectfully submitted:

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By Donna Grodner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served via U.S. mail and/or fax as indicated below to counsel of record this 26th day of January, 2006.

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* *

ORDER ADJUDICATING
MOTION TO REMAND (WITH RESERVATION)

CONSIDERING the *Motion to Remand (With Reservation)*, the motion is hereby _____.

Specifically, it is Ordered that this Court will allow discovery pursuant to FRCP 23 (d) and 16 as submitted by the Plaintiffs.

It is further ordered that this Court suspends ULLR 23.1 (B) (90 days to file a motion) until such time as subject matter jurisdiction is resolved.

It is further ordered that the Plaintiffs may reserve their right to amend their motion to remand pending discovery.

New Orleans, Louisiana, this ___ day of _____, 2006.

_____
Judge Mary Ann Vial Lemmon
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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	*MOSAIC FERTILIZER, LLC

** *

MEMORANDUM IN SUPPORT OF MOTION TO REMAND (WITH RESERVATION)

MAY IT PLEASE THE COURT:

On October 12, 2006, there was a large hydrogen explosion from the Mosaic Faustina Facility located in St. James Parish, Louisiana, which shook the community and which caused some minor property damages and also, some minor physical injuries to yet a few persons. Mosaic removed this action alleging that because the Plaintiffs alleged that there are over 200 putative class members that the amount in controversy is met. The Plaintiffs have also alleged that no claim exceeds $50,000.00 and have not requested a jury trial. The Plaintiffs, in good faith, have also alleged that the aggregate value of all claims in the class do not exceed $5,000,000.00.

The Class sought to be certified at this time is as follows:

> The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

The Plaintiffs have no indication at this time that any claim will be greater than $50,000 in value or that the property damages and fear and fright claims associated with property damage along with the few personal injury claims that may be made will reach $5M.

That the Plaintiffs pled that there are 200 persons in the class does not equate to pleading there that there are 200 properties that were damaged. The number of properties that sustained damage is unknown. The 200 putative class members would include all persons living in a home or who were located at a property that was damaged and who had fear and fright. There will be very few people, who, like Ms. Harvey, experienced any physical effects from the explosion. The Plaintiffs have not alleged that breathing hydrogen or its combustion products is harmful or reasonably related to any claim for fear and fright.

The Plaintiffs, however, must admit that at this juncture they do not know the extent of the property damages and Mosaic possess all facts and evidence which would show or evidence the true nature of the property damages caused by the hydrogen explosion from its facility.

The putative class, therefore, respectfully requests that this Court allow Plaintiffs discovery, as attached hereto, pursuant to FRCP 23 (d) and 16 and that the Plaintiffs be allowed to reserve their right to amend their motion for remand after discovery and that this Court suspend ULLR 23.1 (B) (90 days to file a motion) until after this Court had determined subject matter jurisdiction.

In Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006), Maytag, as the manufacturer of certain ranges and ovens, was sued in state court in a consumer class action under state law which action was removed to federal court under Class Action Fairness Act (CAFA). The original suit filed in state court alleged there were "thousands of members of the above-described class."

In support of its removal, Maytag offered the affidavit of its information analyst that there were a total of 6,729 ranges/ovens in Florida with the model numbers of those with the allegedly defective motorized door latch assembly and that the total value of those 6,729 ranges/ovens was $5,931,971.

After filing a motion to remand, the Plaintiff was allowed a discovery deposition and allowed to then submit the discovery to supplement its motion to remand to show that Maytag failed to carry its burden of proof by a preponderance of the evidence on the

jurisdictional minimum to establish that more than $5,000,000 was in controversy.

Maytag argued that the burden proof on remand was on the Plaintiff to prove that jurisdictional amount was not met (proving a negative) citing and quoting from a Senate Committee Report directed to the CAFA. The Eleventh Circuit rejected Maytag's argument and held that Maytag, as the removing party, bore the burden of proof by a preponderance of the evidence on the motion to remand to establish the jurisdictional amount.

The Eleventh Circuit in Miedema first cited the rule: "Under CAFA, federal courts have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." 450 F.3d at 1327, citing, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1163 (11th Cir. 2006). The Eleventh Circuit then cited to Seventh and Ninth Circuit opinions that rejected the suggestion found in the Senate Committee Report that the burden of proof be on the non removing party. The cases cited were Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well established rule that proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy), and Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.")

The Eleventh Circuit then cited its own precedent, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1164 (11th Cir. 2006), holding, "CAFA does not upset the traditional rule that the removing party bears the burden of proof with regard to establishing federal court jurisdiction."

For these reasons, the Eleventh Circuit found that the removing party bares the burden of proving the jurisdictional minimum by a preponderance of the evidence. The Eleventh Circuit also found that any doubts about the amount in controversy should be resolved in favor or remand and a finding of a lack of jurisdiction. Miedema, 450 F.3d at 1329, citing,

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal statutes]." Syngenta Crop. Prot., Inc. v. Henson, 537 U.S. 28, 32 123 S.Ct. 366, 369, 154 L.Ed.2d 368 (2002) ("[S]tatutory procedures for removal are to be strictly construed."); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("[R]emoval statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."); Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ([A]ll doubts about jurisdiction should be resoled in favor of remand to state court.").

On October 12, 2006, this suit, as captioned above, was filed in the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana, bearing docket number 31350. This suit filed originally in state court alleges that the damages for the entire class do not exceed $5M and that the individual property damage and medical claims associated with the explosion do not exceed $50,000 each. No jury was requested due to the jurisdictional restrictions in state court to obtain a jury.

In order to establish the amount in controversy, Mosaic relies upon the Plaintiffs' Petition which states that there are 200 putative class members. Mosaic argues that the amount in controversy "for at least one plaintiff" exceeds $75,000.00 exclusive of interest and costs. Rather than recognize CAFA's (28 USC § 1332 (d)) **specific application** to class actions removed from state court, Mosaic seeks to instead rely upon Section 1332 (a) a general jurisdiction statute that is nonapplicable to class actions.

Mosaic erroneously avers that even though this litigation is a state court class action sought to be removed to federal court, it need not meed CAFA, and it suggest, however erroneously, that the amount in controversy for a class action is met, through 28 USC § 1332 (a), because attorneys' fees and costs awarded under La. C.C.P. art. 595 may be attributable to the three named class representatives, which according to Mosaic renders the amount in controversy on each of

these claims in excess of $75,000 and thereby *establishes jurisdiction over this class action.*

The fallacy in Mosaic's argument is that subpart (a) does not apply to class action. See 28 USC § 1332 (d).

The CAFA jurisdictional provision, 28 USC § 1332 (d), is specific to class actions removed to federal court and sub-subpart (6) provides that "In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." Here, Mosaic is attempting to mistakenly rely upon 28 USC § 1332 (a), which is a general jurisdictional statute and which is nonapplicable to class actions.

Mosaic bares the burden of proving that the aggregate value of this litigation is in excess of $5,000,000 and not that any class representative's claim is worth $75,000 by aggregating attorney fees with the claims of the class representatives.

Next, Mosaic argues that the Plaintiffs are required to enter into a stipulation as to the value of the case. The CAFA does not require such and the burden of proof on the jurisdictional amount is on Mosaic. By removing this action, Mosaic has stipulated that the aggregate value of the property damages exceeds $5M; the Plaintiffs should be allowed to test Mosaic's stipulation through discovery.

Mosaic incorrectly avers that the present class action is for fear and fright, yet, the Petition clearly states that it is limited to property damage, fear and fright claims associated with the property claims and to those rare persons with personal injuries associated with explosion. The putative class has not averred that breathing hydrogen or the products of its combustion are associated with damages or fear and fright.

Mosaic next avers that because the claims arise in St. James Parish that the Plaintiffs have thereby alleged that the entire Parish was damaged. Mosaic's characterization of the Petition is unfounded. The reach and distance from the facility of the property damages caused by the shock wave is unknown at this time. The distance that the wave traveled and where it traveled is unknown. Discovery is necessary.

Next, Mosaic argues that 28 USC § 1367 allows this Court to exercise supplemental jurisdiction over this action, where another action removed to this Court may meet CAFA and where the two actions may be consolidated. The plain language of Section 1367 does not allow such.

Further in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), the United States Supreme Court rejected the suggestion that Section 1367 provides a basis for original jurisdiction. Discussing whether 28 USC § 1367 provides removal jurisdiction, the Supreme Court wrote, 123 S.Ct. at 370, as follows:

> They argue that respondent's maintenance of the Henson action undermined the Price settlement and that, in light of the Alabama court's retained jurisdiction, ancillary enforcement jurisdiction was necessary and appropriate. **But they fail to explain how the Alabama District Court's retention of jurisdiction over the Price settlement authorized *removal* of the Henson action. Removal is governed by statute, and invocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with statutory requirements**.
>
> Read in light of the question presented in the petition for certiorari, perhaps petitioners' argument is that ancillary jurisdiction authorizes removal under 28 USC § 1441. As we explained in Peacock, however, a "**court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims.**" 516 U.S., at 355, 116 S.Ct. 862. Ancillary jurisdiction, therefore, cannot provide the original jurisdiction that petitioners must show in order to qualify for removal under § 1441.
>
> Section 1441 requires that a federal court

have original jurisdiction over an action in order for it to be removed from a state court. [Emphasis added]

Thus, Section 1367 does not provide a basis for removal jurisdiction.

According to the federal statute governing supplemental jurisdiction, even where this Court may have original jurisdiction over another related action arising out of the same transaction and occurrence, and where that jurisdiction is founded on diversity (28 USC § 1332) and the actions are merely consolidated, the Court may not exercise original jurisdiction through 1367 over this action simply because of consolidation.

Thus, a district court must have original jurisdiction over the claims in each separate action.

Specifically, 28 USC § 1367 (b) provides in pertinent part:

> **In any civil action of which the district courts have original jurisdiction** founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1447 (c) requires remand

A motion to **remand the case** on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under sections 1446 (a). If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Thus, Section 1367 does not provide a basis for original or removal jurisdiction.

On November 3, 2006, the above captioned matter was removed to this Court.

Mosaic Fertilizer, LLC (Mosaic) has alleged that the entirety of the claims for property damages, fear and fright claims associated with property damages and minor medical treatment claims exceed $5M. Mosaic must prove such by a preponderance of the evidence.

The Plaintiff movants are without a basis in fact to justify a belief in Mosaic's averment of jurisdiction. Movants do not wish to make any representations to this Court about the extent of the explosion and property damages caused thereby in the absence of discovery on this issue. The discovery sought is attached hereto.

Should discovery indicate whether there is a good faith basis for the movants herein to represent that the damages caused by the explosion are in excess of $5,000,000, the Plaintiffs will amend their complaint/petition regarding the jurisdictional amount in controversy.

The discovery that the Plaintiff movants seek to propound is limited to subjection matter jurisdiction and the amount of property damages and personal injury damages caused by the explosion.

The Plaintiff movants seek leave of ULLR 23.1 (B) (90 days to file a motion) to move for certification on the basis that subject matter jurisdiction should be resolved prior to any other action or proceedings before this Court to conserve judicial efficiency and economy.

Movants seek to reserve their right to amend this motion to remand pending discovery on the jurisdiction amount in controversy.

CONCLUSION

This Court should allow the Plaintiff movants to take discovery on the jurisdictional amount, Plaintiffs should be allowed leave to file a motion to certify a class once the jurisdictional issue is resolved and Plaintiffs should be allowed to amend this motion to remand

pending discovery on the jurisdictional amount in controversy.

Respectfully submitted:

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	*MOSAIC FERTILIZER, LLC

** * * *

continue until complete of such persons who can provide testimony binding on the corporation regarding the following topics as follows:

1. Photographs taken after the explosion showing the damages to your facility;
2. Photographs taken after the explosion showing the damages or alleged damages that were/are off-site from your facility;
3. Any itemization or description of all damages to your facility including, but not limited to, any control room, door, wall, concrete, foundation, or other structure;
4. All repairs to your facility, including but not limited to, removal and repouring of concrete/cement or the ilk where cracks occurred, particularly in any walkway, foundation, or structure including brick, concrete, cement, mortar or metal.
5. If you have conducted or inventoried any piece of metal or structure that was thrown by the explosion from its original position within your physical structure, please produce the diagram and photographs and weights of each piece of scattered structure, including where they were found, where they originated, the weight of each piece and the numbering assigned.
6. If there was any crater, hole or ground depression caused by the explosion, please produce all photographs, measurements and other data gathered from such crater, hole or ground depression.
7 If you received any telephone calls from persons who are not your employees concerning the explosion, please produce a list and description of the nature of the call.
8. If there have been any claims made against or attempted to have been made against you for damages alleged caused by the explosion, please produce all documentation.
9. For each off-site inspection or investigation performed by you or on your behalf, please produce the following:
   a. location of the property;
   b. purpose of the inspection or investigation;

c. date of inspection or investigation;
d. description of damages reported;
e. description of damages found;
f. how long the inspection lasted; and
g. identity and contact information for the person who performed the inspection and who was present during the inspection.

10. If you have adjusted any claim, please provide the following:
    a. location of the property;
    b. identity and contact information of person who was paid;
    c. amount paid;
    d. description of damages claimed; and
    e. amount and description of damages paid.
11. If you have denied any claim, please provide the following:
    a. location of the property;
    b. identity and contact information of person who was paid;
    c. description of damages claimed; and
    d. basis for denial.
12. If you have adjusted any claims, please produce all documentation.
13. If you have inspected any off-site structure for whatever purpose as a result of the explosion, please produce all documentation.
14. If you have taken any statement from any person regarding property damages, please produce.
15. If you have received any proof of loss, letter or other written communication from any person regarding property or personal injury damages, please produce.
16. If you have turned claims over to your insurance carrier, please produce all such documentation.
17. Please provide the names and contact information for any adjuster who was ever assigned to or had anything to do with claims arising out of or alleged to arise out of the explosion.
18. If you have paid any claim(s), please produce all documentation evidencing such.
19. If you have performed an internal investigation into the nature and cause and/or extent of

damages caused by the explosion, please produce the investigative report(s).

20. Information relating to the loss reserves for the claims that allegedly arise out of the explosion including the daily claim reports showing the highest and lowest reserve set for the claim.
21. All documents sent to your insurer regarding the amount of the loss.
22. Please produce your adjustment report showing the damages caused by what you claim to be a covered loss.
23. If you, or a person acting on your behalf, has/have denied any claim, please provide the basis for the claim denial.
24. If you, or a person acting on your behalf, has/have performed any calculation of the ground wave in particles per second or other measurement, please produce all such calculations.
25. Please describe the shock wave created by explosion.
26. Please provide the measurements or findings, including but not limited to frequency, duration and distance traveled, by any wave, whether air or ground, created by the explosion and the calculations and factual support for such finding or measurement.

Respectfully submitted:
By Donna Grodner

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	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
	*MOSAIC FERTILIZER, LLC

****

OPPOSITION TO MOTION TO REMAND

Mosaic Fertilizer, LLC ("Mosaic") opposes the plaintiffs' motion to remand this matter to the 23rd Judicial District Court, St. James Parish, Louisiana. Plaintiffs assert that the amount in controversy in this matter is not sufficient to vest subject matter jurisdiction in this Court under 28 U.S.C. § 1332(d).[1] The motion to remand should be denied because this case was properly removed based upon this Court's diversity jurisdiction under either 28 U.S.C. §1332(a)or§1332(d).

I. Mosaic Can Use Both the Traditional Diversity Jurisdiction Statute (28 U.S.C. S1332(and CAFA (28 U.S.C. S1332(d) as Bases for Removal.

Plaintiffs erroneously argue that the diversity jurisdiction provision of the Class Action Fairness Act ("CAFA")2 is now the exclusive basis for federal court jurisdiction over class actions. [Doc. 7-4, p. 5-6]. As explained by the Court in Robinson v. Cheetah Transportation, 06-0005, 2006 WL 468820 (W.D. La. Feb. 27, 2006)- at p. 2, affirmed,

1 Plaintiffs raise only the amount in controversy requirement under 28 U.S.C. §1332(d), and do not dispute that the other requirements for diversity jurisdiction under that section have been met.

2 CAFA added several provisions relating to federal class action procedure.

2006 WL 1453-03.6.(W.D. La. May 11, 2006), CAFA actually expands the federal courts' diversity jurisdiction over class actions by removing the complete diversity of citizenship requirement, provided other requirements for class size and amount in controversy are met:

> On February 18, 2005, Congress enacted CAFA to expand federal jurisdiction over class action suits involving out-of-state defendants. Partly based on its finding that state courts' biases and highhandedness in class actions tend to "undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution," Congress created the concept of "balanced diversity." CAFA of 2005, Pub.L. No. 109-2, § 2, 119 Stat 4 (codified in scattered sections of 28 U.S.C.); S. Rep. No. 109-14, at 6 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 7. Unlike normal diversity where plaintiffs and defendants must be completely diverse, "balanced diversity" will tolerate some class-action plaintiffs sharing citizenship with defendants so long as at least one "member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. 1332(d)(2)(A). In this instance, a district court shall have original jurisdiction provided that two other requirements are met: (1) the putative class consists of 100 or more members, 28 U.S.C. 1332(d)(5)(B); and (2) the matter in controversy, as between the putative class, exceeds the sum or value of $5,000,000. 28 U.S.C. § 1332(d).

Plaintiffs cite no authority whatsoever for the argument that CAFA is now the "exclusive" basis for federal court jurisdiction over class actions. Traditional diversity jurisdiction under 28 U.S.C. §1332(a) still exists. Section 1332 was not amended by CAFA and does not exclude class actions. The Senate Committee on the Judiciary expressly intended to expand federal court jurisdiction over class actions:

> Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read

> broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.

S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977.

..... Furthermore, CAFA. added 28 U..S .C. § 1453, which, allows removal of class, actions satisfying only minimal diversity under § 1332(d). Sectionl453 makes it easier for removals of class actions by allowing removal even if a defendant is a Louisiana citizen, without the consent of all defendants, and beyond one year of the action being filed. Therefore, the relaxation of procedural rules that CAFA makes for class actions is further evidence that federal court jurisdiction over class actions has expanded.

There is simply no statutory or jurisprudential prohibition against federal court jurisdiction over class actions where complete diversity of citizenship exists and the amount in controversy requirement under 28 U.S.C. §1332(a) is met. Thus, in complete diversity of citizenship class action cases, such as this one, subject matter jurisdiction may be based on either §1332(a), or the new §1332(d), provided the other statutory requirements for jurisdiction are met.

II. Diversity Jurisdiction Amount in Controversy Requirements.

A. Burden of Proof and Applicable Standard

The amount in controversy in this case must exceed $75,000 for at least one plaintiff (see §1332(a)) or exceed $5,000,000 in the aggregate (see §1332(d)).

The Fifth Circuit has articulated a clear analytical framework for evaluating the amount in controversy requirement of diversity jurisdiction for cases removed from Louisiana state courts where the procedural rules prohibit the assertion of monetary damages. The Court looks to whether it is "facially apparenf from the petition, or sufficiently plead in the removal petition:

> To such a situation, the removing-defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. De Aguilar v. Boeing Co., 11 F.3d 55, 58 (5th Cir. 1993). The defendant may make this showing in either of two ways: (1) by demonstrating that it is

"facially apparent" that the claims are likely above $75,000, or (2) "by setting forth the facts in controversy preferably in the removal petition, but sometimes by affidavit-that support a finding of the requisite amount." Allen v.R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (emphasis in original).

Luckettv. Delta Airlines, Inc., 171 F.3d295, 298 (5th Cir. 1999).

The same "facially apparent" standard applies to removals under CAP A. However, unlike § 1332(a), CAFA explicitly allows aggregation of each class member's claim. 28 U.S. C. §1332(d)(6). The Fifth Circuit recently used this standard in Frazier v. Pioneer Americas, LLC, 455 F.3d 542 (5th Cir. 2006):

> ... and although the petition did not seek recovery of a specific amount, we are satisfied the petition, seeking damages for severe injuries suffered by at least 500 people and attorneys' fees, makes it "facially apparent" that at least $5 million is in controversy,[FN omitted] in the aggregate. [FN omitted]

If it is not facially apparent that the claims are likely to be above the required amount, the removing party may support federal jurisdiction by setting forth the facts hi controversy — preferably in the removal petition, but also by affidavit — that support a finding of the requisite amount. Allen v. R & Oil & Gas Company, 63 F.3d 1326, 1335 (5th Cir. 1995).

Once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995).

B. Attorneys' Fees Attributable to Named Plaintiffs in Class Actions are Included in the Amount in Controversy

In addition, under Louisiana's class action law, reasonable expenses, including attorneys' fees, are attributable to the name plaintiffs), and are to be considered in determining the amount in controversy. The Fifth Circuit has held that because Louisiana Code of Civil Procedure article 595 gives a court discretion to

award attorneys' fees to a class representative as "expenses of litigation," such fees are includable in a jurisdictional amount determination for diversity purposes regardless of the existence of separate statutory authorization of attorneys' fees. Grant v. Chevron Phillips Chem. Co., 309 F.3d 864 (5th Cir. 2002).

Grant involved a situation nearly identical to the suit here. In Grant, plaintiffs filed a class action after an industrial accident occurred at Chevron's chemical plant in St. James Parish, Louisiana. The putative class was defined as "all persons or entities located within five miles of the plant who may have suffered damages as a result of the incident," and the petition "asserts Louisiana causes of action in negligence and strict liability." Id at 867. The petition in Grant also specifically alleged that "[t]he claims of the plaintiffs herein for compensatory damages are all each [sic] individually less than $74,999.00." The Fifth Circuit held that the amount in controversy requirement of 28 U.S.C. § 1332 was satisfied as to at least one named representative because article 595(A) allows the court to award attorneys' fees and, if they are awarded, they must be attributed solely to the named class representatives.

C. An Allegation that the Amount in Controversy does not Exceed the Jurisdictional Amount is not Determinative of Amount in Controversy.

In De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995), the Fifth Circuit was faced with the issue of how to deal with plaintiffs who "in a bold effort to avoid federal court, have specifically alleged that their respective damages will not exceed the jurisdictional amount." Id. at 1409-1410. The Fifth Circuit was cognizant that it needed to "protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand." Id. at 1411.

The Fifth Circuit requires "litigants who want to prevent removal [to] file a binding stipulation or affidavit with their complaints" Id. at 1412 [emphasis added]. Once a defendant has removed the case, later filings, either through stipulation or amended petition, are completely irrelevant. Id. at 1412.

Here, no binding stipulation or affidavit was filed with plaintiffs' petition. Therefore, the plaintiffs' allegations in the petition that the amount in controversy of any class member's claim does not exceed $50,000, and the class action damages as a whole will not exceed $5,000,000, is not binding, and is irrelevant to the amount in controversy determination.

III. Mosaic has Met its Burden of Proving the Amount of Controversy for Diversity Jurisdiction Under Either §1332(a) or $1332fdi

A. It is Facially Apparent that the Amount in Controversy is Met.

When the district court is making the "facially apparent" determination, the proper procedure is to look only at the face of the complaint and ask whether the amount in controversy is likely to exceed the appropriate threshold. Allen, 630 F.3d at 1336. Where the "facially apparent" -test is not met, -it-is appropriate for the court to consider summary judgment-type evidence relevant to the amount in controversy as of the time of removal. Id. at 1336.

With regard to jurisdiction under 28 U.S.C. § 1332(a), there is no dispute that complete diversity of citizenship exists. Plaintiffs are alleged to be domiciled in St. James Parish, Louisiana. (Removal, para. 6; Petition, para.l). Mosaic is a Delaware corporation with its principal place of business in Florida. (Removal, para. 7). With regard to the amount in controversy, Mosaic stated in its removal:

9.

In light of the allegations of the complaint, defendants show that the amount in controversy for the claims of at least one plaintiff exceeds $75,000, exclusive of interest and costs.

10.

The amount in controversy requirement is easily satisfied here. Although plaintiffs alleged their claims "are not in excess of $50,000," [Petition, Paragraph 1], such allegation is not sufficient to preclude federal diversity jurisdiction under 28 U.S.C. §1332. First, plaintiffs claim that on October 11,2006, a "large explosion" occurred "when hydrogen gas leaked out of the pipe and came into contact with an ignition source." [Petition, Paragraph 7]. The explosion allegedly "shook

homes and caused vibrations that started [sic] individuals and caused property damages." [Petition, Paragraph 8]. Specifically, the plaintiffs claim they suffered both fear and fright and property damages from the shock of the explosion, such as movement of concrete piers, breakage of windows, cracked driveways and cracked floor tiles. [Petition, Paragraphs 2-4], All of the plaintiffs heard and felt the explosion. [Petition, Paragraphs 2-4]. The explosion was of such magnitude that Ms. Harvey's blood pressure and pulse became uncontrolled, requiring emergency medical treatment. [Petition, Paragraph 2].

> Second, because this case is filed as a class action on behalf of at least 200 area residents [Petition, Paragraph 12], the amount in controversy includes reasonable expenses, including attorneys' fees awarded under La. C.C.P. Art. 595, attributable to the class representative(s). Third, plaintiffs have not and cannot enter into an irrevocable stipulation binding on all proposed class members waiving or foregoing damages in excess of the jurisdictional minimum for each and every proposed class member.

12.

Therefore, the amount in controversy on the claim of at least one plaintiff, on the face of the pleadings, is above $75,000.

13.

Additionally, pursuant to 28 U.S.C. § 13 67 (a), this Court may and should exercise supplemental jurisdiction over the claims of all plaintiffs and putative class members.

4.

Consequently, this Court has jurisdiction under 28 U.S.C. §1332(a).

With regard to jurisdiction under CAFA, minimal diversity of citizenship is easily met. On the class size and amount in controversy issues, Mosaic stated:

17.

Second, the proposed class is estimated "to be at least two hundred and so numerous as to make joinder of all of them impracticable." [Petition, Paragraph 12]. Therefore, the requirement that the putative class

contain at least 100 class members is met on the face of the petition.

18.

Third, the sum or value of the putative class claims exceeds $5,000,000, based on the allegations of the petition. CAFA applies if the sum or value of the claims of the putative class in the aggregate exceeds $5,000,000. 28 U.S.C. §1332(d)(2). According to the plaintiffs, "the actual number of persons who or which will elect to maintain their claims through this litigation will be better established after notification to all putative class members that this action is pending." [Petition, Paragraph 13]. Plaintiffs allege that the claims of the named plaintiffs, who all heard, felt, were frightened or surprised by the explosion, and suffered property damage, are typical of the class. [Petition, ..Paragraph. IX]. ..Plaintiffs have moved.for class eertification^asserting the .class is "all persons located or employed in the community of St. James and the surrounding area who sustained property damages, personal injuries, emotional, mental, economic or nuisance damages as a result of the incident on October 12, 2006, [sic] and who claim legally compensable damages. [Plaintiffs' Motion and Incorporated Memorandum in Support to Certify a Glass Action, Paragraph 2], Plaintiffs' petition similarly proposes the class of persons who "were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result" of the explosion on October 11, 2006.

19.

According to the 2000 census, the total population, of St. James Parish is 21,216. If the population contains 5,000 class members, then the class claims need only amount to $1,000 each for the $5,000,000 threshold to be met. If the class has 2,500 members, the class members1 claimed damages need only amount to $2,000 each for the $5,000,000 threshold to be met. Considering the alleged geographic area of the class as the communities surrounding the Mosaic Fertilizer, LLC site in St. James Parish, and the alleged nature of the damages as physical, mental, and property damage experienced by persons and

businesses, the putative class members' claims in the aggregate, plus attorneys' fees attributed to the plaintiffs' claims, could easily exceed the $5,000,000 threshold. Again, plaintiffs have not and cannot enter an irrevocable stipulation binding on all proposed class members waiving or foregoing damages in excess of the juris dictional minimum for each and every proposed class member.

The Senate Judiciary Committee Report on CAFA provides that the amount in controversy requirement of §1332(d)(6) should be read "expansively" in favor of federal jurisdiction. The Senate Report states that the Committee intends for there to be jurisdiction if there is more than $5 million in controversy, "either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought," whether it is damages, injunctive relief, or declaratory relief. S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 40,-2005 -WL-627977. The Senate Report also addresses the pre-GAFA cases to the contrary and finds their concerns "no longer relevant" in light of CAFA's aggregation requirement. Id. at 41.

B. Damage Awards in Similar Cases Support a Determination that the Amount in Controversy is Met.

Courts have generally looked to the amount of compensatory damages that have been recovered in similar cases to determine what amount should be used in determining the amount in controversy. See Marcel v. Pool Co., 5 F.3d 81, 82-83 (5th Cir. 1993).

The plaintiffs allege property damages, fear and fright, and medical treatment as a result of the explosion. "Fear and fright" claims resulting from chemical releases will generally result in awards from $3,000 to $10,000. See Cooper v. Koch Pipeline Inc., 95-2373, 1995 WL 931091 (E.D. La. 1995).3 In Prestenbach v. Louisiana Power & Light Co., Inc., 93-656 (La. App. 5th Cir. 4/14/94), 638 So.2d 234, it was an abuse of discretion to award only $5,000 for general damages suffered by a plaintiff whose psychological and respiratory problems were aggravated after an electrical transformer ruptured a block away from her. She was terrified by the blast, and was exposed to smoke and chemical irritants. The court found that $25,000 was the minimum award allowable for the plaintiffs injuries

considering the plaintiff had an underlying psychological disorder that was aggravated by the additional stress of the accident.

3 Cooper was decided before Grant v. Chevron Phillips Chem. Co., 309 F.3d 864 (5th Cir. 2002), which resolved the dispute over whether attorneys' fees could be imputed to named plaintiffs in class actions for determining amount in controversy. Accordingly, the remand of the consolidated class actions in Coop er is neither controlling nor persuasive authority as to whether the amount in controversy is met in this case.

Further, *In RE New Orleans Tank Car Leakage Fire litigation*, 2000-0479 (La.. App, 4th Cir. 6/27/01) 795 So.2d 364, the 20 trial plaintiffs in a butadiene leakage case received a total of $350,000 in general damages, or an average of $17,500 each. While the "testimony of the twenty selected plaintiffs regarding their experiences" varied, which accounted for "the broad range in the amounts of the awards of damages made," the general themes that emerged from the plaintiffs' testimony were "the sound of an explosion, the sight of flames, the smell of smoke and fumes, and the middle-of-the-night evacuation, combined to produce fear and confusion which aggravated the fear." Id at 392.

Jurisdiction under CAP A applies if the sum or value of the claims of the putative class in the aggregate exceeds $5,000,000. 28 U.S.C. §1332(d)(2). According to the plaintiffs, "the actual number of persons who or which will elect to maintain their claims through this litigation will be better established after notification to all putative class members that this action is pending." [Petition, para. 13]. Plaintiffs allege that the claims of the named plaintiffs, who all heard, felt, were frightened or surprised by the explosion, and suffered property damage and/or obtained medical treatment, are typical of the class. [Petition, para. 11]. Plaintiffs have moved for class certification, asserting the class is "all persons located or employed in the community of St. James and the surrounding area who sustained property damages, personal injuries, emotional, mental, economic or nuisance damages as a result of the incident on October 12, 2006, [sic] and who claim legally compensable damages. [Plaintiffs' Motion and Incorporated Memorandum in Support to Certify a Class Action, para.

2]. Plaintiffs' petition similarly proposes a class of persons who "were present and/or owned property in the effected vicinity in St. James parish and who or which experience fear and fright with property damages and/or minor medical treatment as a result" of the explosion on October 11,2006.

As stated in the removal petition, the total population of St. James Parish is 21,216 according to the 2000 census. If the population contains 5,000 class members, then the class claims need only amount to $1,000 each for the $5,000,000 threshold to be met. If the class has 2,500 members, the class members' claimed damages need only amount to $2,000 each for the $5,000,000 threshold to be met. Even if there are only 1,000 class members, a potential $5,000 award to each class member, a value well within the fear and fright range under Cooper v. Koch, would place the amount in controversy at $5,000,000.

The Court must also consider the significant property damage pled by the plaintiffs as property damage "typical" of the class. The explosion is alleged to have damaged a concrete pier supporting Ms. Harvey's home (Petition, para, 2), broken a large window in Mr. Gauthreaux's home (Petition, para. 3), and cracked the Alberts' driveway and living room floor tiles, among other property damage (Petition, para. 4). In addition to the fear and fright allegations and property damage claims, plaintiffs claim that the class consists of people like Ms. Harvey who suffered personal injury damage and medical expenses. If Ms. Harvey is representative of the class, then there may be hundreds of others to whom the explosion caused physical injury requiring emergency medical treatment. Ms. Harvey's claim of structural property damage, significant fear causing physical injury, and medical expenses, in and of itself likely exceeds $75,000 in controversy for purposes of § 1332(a).

Based upon the damages pled by the named plaintiffs as being typical of the class, the $5,000,000 amount in controversy requirement is clearly met on the face of the petition.

C. Attorneys' Fees Alone Meet the Amount in Controversy Under §1332(a)

In this case, even if the required amount in

controversy is not supported by the plaintiffs' claims for compensatory damages, attorneys' fees awardable under La. Code Civ. Proc. article 595 place at least $75,000 in controversy for at least one plaintiff as required under §1332(a). For example, even if there are ultimately only 500 class members, and they are awarded an average of $1,000 each in compensatory in damages, it would result in a total award of damages of $500,000. An attorney's fee of thirty percent would result in a fee of $166,650 - an amount more than sufficient to satisfy §1332(a). Consequently, in this case, an award of attorneys' fees to the named plaintiffs, would be sufficient to support diversity jurisdiction under 28 U.S.C. §1332(a), as there is. complete diversity of citizenship in this case.

D. The Court Should Also Consider the Additional Significant Petition Allegations of the First Filed Class Action

This class action was not the first class action filed as a result of the October 11,2006 incident at Mosaic. Vivian Folse, et al v. Mosaic Fertilizer, LLC, et al, CANo. 6-9512, Sec. S, Mag. 1 ("the Folse Class Action") (attached as Exhibit "A"), was transferred to this section on November 20, 2006, "pursuant to Local Rule 3.1 for possible consolidation." Pending before this Court is a motion to consolidate the Folse Class Action with the above action for pretrial and trial purposes.

The Folse Class Action was the first class action filed on October 11, 2006,arising out of the October 11,2006 incident.. The Folse Class Action, originally bearing docket number 31344 in the 23rd Judicial District Court, St. James Parish, was filed "on behalf of all persons or entities who or which sustained direct and/or consequential injury and damage as a result of an explosion and release of hazardous substances from the Mosaic Fertilizer, LLC facility in the Parish of St. James, State of Louisiana, on or about the 1 lth day of October, 2006 at approximately 8:15 p.m. and continuing thereafter, which caused damages as alleged herein." The Folse Class Action plaintiffs allege that the class consists of "all persons and entities located or residing in the Parish of St. James who sustained personal, mental, emotional, and economic damages and/or convenience as a result of the explosion and

release of hazardous substances." Accordingly, the Harvey plaintiff's are putative class members in the first-filed Folse Class Action, The captioned case and the Folse Class Action contain the same claims against Mosaic arising out of the same incident, and allege essentially the same class.

The important point here is that the Folse Class Action petition contains additional significant allegations. The Folse petition specifically alleges that hazardous substances were released that caused "considerable fear, anguish, discomfort and inconvenience,... as well as bodily injuries". (Folse petition, para. XI). The class definition in Folse includes not only individuals, but businesses that suffered property damage and economic damages. Moreover, the Folse plaintiffs' pray that the class be certified for "determining the common issues of liability for compensatory and exemplary damages." (Folse petition, prayer para. 2)(emphasis added).

Damages in excess of $75,000 have been awarded in other chemical exposure cases, with those plaintiffs proving damages similar to the types of damages broadly alleged in Folse. For example, mLasha v. Olin Corp., 91-459 (La. App. 3d Or. 3/2/94), 634 So.2d 1354, the third circuit, on remand from the Louisiana Supreme Court, awarded $350,000 to a DSI employee who was exposed to chlorine. He claimed he was unable to do anything except lay on the floor and watch television. He stated, that he experienced shortness of breath, his lungs hurt constantly, and he occasionally coughed up blood.

In *Soileau v. Olin Corp.*, 467 So.2d 128 (La. App. 3d Cir. 1985), the plaintiff was exposed to phosgene gas as he was making a delivery to the Olin plant in Lake Charles. He complained that on the day following the exposure, he was nauseous and dizzy and had to stop his truck to vomit. After numerous physician visits and tests, the plaintiff was not diagnosed with any physical ailment. At trial, the jury awarded the plaintiff $175,000.00 in damages, which was upheld by the court of appeal.

Class actions under Rule 23 of the Federal Rules of Civil Procedure do not provide class members with an automatic right to opt out of the class. (See Fed. R. Civ. Proc. 23(c)(2)(B)). Thus, Harvey plaintiffs cannot opt out

of the Folse Class Action by filing a separate petition and pursuing their own action at this stage of the litigation. The cases should be consolidated and treated as one class action under Rule 23. There is no factual or legal basis to remand mis case, and simultaneously exercise jurisdiction of the Folse Class Action which is properly before this Court.

W. PLAINTIFFS REQUEST FOR JURISDICTIONAL, DISCOVERY SHOULD BE DENIED

Plaintiffs ask that they be allowed to conduct discovery relating to the amount in controversy, including but not limited to property damage on Mosaic property and in the area, claims made by area residents, telephone calls from claimants, and investigations relating to off-site damages from the explosion. [Doc. 7-5]. But as discussed above, if the amount in controversy is shown on the face of the petition and removal pleading, no evidence is required to be submitted and, therefore, discovery is not warranted.

The Senate Committee on the Judiciary made it clear that jurisdictional discovery under CAFA is to be limited in scope:

> However, the Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions.

S.Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 42 [emphasis added]. Jurisdictional discovery in CAFA cases, therefore, should be sufficiently tailored to lead to information concerning the jurisdictional issue. Plaintiffs have not set forth any persuasive argument or authority supporting the need for a Federal Rule 30 corporate deposition of Mosaic to obtain information relevant to the amount in controversy requirement. Rather plaintiffs' request to depose Mosaic is clearly more germane to the merits of the case and to identifying potential class members.

Miedema v. Maytag, 450 F 3.d 1322 (11th Cir. 2006) cited by plaintiffs, is clearly distinguishable. [Doc. 7-4, p. 2-3]. The Miedema court recognizes that the court

must first examine whether it is "facially apparent from the compliant that the amount in controversy exceeds the jurisdictional requirement." Id at 1330. But in Miedema, the amount in controversy was not facially apparent and the court, therefore, looked at evidence submitted by Maytag on the amount in controversy at the time the case was removed. The class action suit at issue was a products liability action alleging that various "ranges/ovens" designed and manufactured by Maytag contained a defective motorized door latch assembly that allowed heat to escape and damage other range/oven components. The plaintiff sued on behalf of a class of similarly situated consumers of Maytag ranges/ovens that incorporated the defective motorized door latch assembly, including all purchasers in the state of Florida who bought a particular model. Id at 1324-1325. Maytag's removal relied upon a declaration submitted by its information analyst who had researched the number of ranges/ovens bearing the model numbers at issue that had been sold in Florida, and the value of those ranges/ovens. Thus, the amount in controversy was a matter in the particularized knowledge of the defendant, Maytag, and related to an exact determination and calculation of relevant numbers of units at issue.

This is a mass tort case. The amount in controversy is not in the particularized knowledge of Mosaic. In fact, the party with the most knowledge as to the nature of the claims and the potential number of claimants are the named plaintiffs themselves, who allege that their damages are representative of the class. Plaintiffs would gain nothing by conducting discovery they have requested from Mosaic in light of the information that they or their counsel should already know in order to have brought the class action lawsuit.in the first place.

Allowing plaintiffs to conduct discovery at this point as requested would add nothing to the amount in controversy determination. The extent of on-site property damage sustained by Mosaic is irrelevant to the amount in controversy determination. Discovery as to any investigations by Mosaic regarding off-site property damage, and information regarding telephone calls and claims submitted by area residents, would do nothing more than identify the names of potential class

members. The nature, type and extent of damages claimed by anyone who called Mosaic after the explosion does not and would not change the amount in controversy based on the plaintiffs' petition allegations. Mosaic submits that the requisite amount in controversy, whether under §1332(a) or §1332(d), is established by the allegations of the pleadings, including the removal petition, and the nature of the damages sought, including attorneys' fees. If the Court is not satisfied from the pleadings that the requisite amount in controversy is present, however, Mosaic respectfully submits that it should be given an opportunity to obtain and present additional jurisdictional facts prior to having this Court rule on the motion to remand.

4 By signing the petition, plaintiffs' counsel has represented to the Court that to the best of their knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the claims axe warranted and that the allegations have evidentiary support. See Fed. R. Civ. Proc. 11 (b)(2) and (3)-

V. CONCLUSION

Mosaic has met its burden of proving the amount in controversy under either the traditional complete diversity jurisdiction statute, 28 U.S.C. §1332(a), or CAFA, 28 U.S.C. § 13 3 2(d). Accordingly, plaintiffs' motion to remand should be denied.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2007, I electronically filed the foregoing Opposition to Motion to Remand with the Clerk of Court by the CM/ECF system which will send the notice of electronic filing to the following:

Donna U. Grodner GRODNER & ASSOCIATES 223 Quail Run, B-1 Baton Rouge, Louisiana 70808

I further certify that I served the foregoing document and the notice of electronic filing by facsimile and first-class mail to the following non-CM/ECF participants:

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DOCUMENT NO. 10
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23rd JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JAMES
STATE OF LOUISIANA
NO: 31,344 DIVISION: DOCKET:
VIVIAN FOLSE, DAVID WINCHESTER, GAIL LEBOUF, DALE DENNIS, and BARBARA LABOUF
VERSUS
MOSAIC FERTILIZER, LLC, DONALD BROOKS, and JOSEPH DELATTE

CLASS ACTION PETITION FOR DAMAGES

The petition of VIVIAN FOLSE, DAVID WINCHESTER, GAIL LEBOUF, DALE DENNIS, and BAKE ARA LABOUF, persons of the age of majority and a resident of the Parish of St. James, AND ALL OTHERS SIMILARLY SITUATED, with respect represents as follows:

I.

Petitioners bring this action on their own behalf and on behalf of all others similarly situated whose claims do not exceed the sum of 74,999.00 in the respects hereinbelow stated:

II.

This is a class action pursuant to La.C.C.P. Art. 591, et seq. on behalf of all persons or entities who or which sustained direct and/or consequential injury and damage as a result of an explosion and release of hazardous substances from the MOSAIC FERTILIZER, LLC facility in the Parish of St James, State of Louisiana on or about the 11th day of October 2006 at approximately 8:15 p.m. and continuing thereafter, which caused damages as alleged herein.

III.

Made defendants herein is MOSAIC FERTILIZER, LLC, a foreign Limited Liability Company doing business hi Louisiana at its facility at 9959 Highway 18, S.t. James parish, Louisiana, and, and DONALD BROOKS and JOSEPH DELATTE, both persons of the age of majority and residents of the state of Louisiana, Parish of St. James.

IV.

The said MOSAIC FERTILIZER, LLC facility and its contents, components, and appurtenances was at all times relevant hereto in the custody and garde of MOSAIC FERTILIZER, LLC, and as a result MOSAIC

FERTILIZER, LLC is strictly liable under the provisions of La.CC. Art. 2317 for the damages caused by the explosion and releases of hazardous substances.

V.

Alternatively, and in addition, the releases of toxic substances were caused by the negligence of the defendants, Mosaic Fertilizer, LLC, Donal Brooks, and Joseph DeLatte in the following particulars, but not necessarily limited thereto:

1. In allowing to exist atthe aMOS AIC FERTILIZER, LLC facility hazardous situation consisting of faulty and/or damaged equipment, parts and appurtenances; .
2. In failing to discover or repair the faulty and/or damaged equipment, parts and appurtenances;
3. In failing to use proper workmanship in the maintenance and repair of the facility, to assure its safe use for the storage and handling of hazardous substances at all times;
4. In failing to use proper workmanship and care in working in the area of the releases of hazardous substances;
5. In failing to properly inspect said facility to assure that it was fit for its intended purpose;
6. In designing and maintaining a facility which was useless for its intended purpose;
7. In acting in a careless aad negligent manner without due regard for the safety of others;
8. In failing to promulgate, implement and. enforce rules and regulations pertaining to the safe operation of the procedures being employed at the time of the accident which, if said rules and regulations had been so promulgated, implemented and enforced, would have averted said

accident;

9. In using wrong, improper and/or inferior materials;
10. In failing to perform adequate testirig of its facility;
11. In failing to adequately prepare for the possibility of toxic releases at said facility, said toxic releases being foreseeable in the operation and maintenance of a manufacturing complex and its appurtenances;
12. Such other acts of negligence and omissions as will be shown at the trial of this matter.

All of which, the aforesaid acts of negligence are in violation of the laws of the State of Louisiana and the ordinances of the Parish of St. James which are pleaded herein as if copied in extenso.

VI.

The actions of Mosaic Fertilizer, LLC.,Donald Brooks and Joseph DeLatte were willful and a violation of applicable safety standards and statutes in their failure to do proper testing and inspection procedures on the facility and in its appurtenances at the Mosaic Fertilizer, LLC: facility in the Parish of St. James, and, as a result, the defendant's conduct constituted negligence per se.

VII.

In addition to the above stated negligence, and in the alternative thereto, the injuries and damages suffered by your petitioner and others was caused by acts or omissions of the defendants, which acts or omissions may be ibeyond proof by the plaintiff herein, but which were within the knowledge and control of the defendants, there being no other possible conclusion than that the releases of toxic substances resulted from the negligence of the defendants, and that furthermore, releases of toxic substances could not have occurred had Mosaic Fertilizer, LLC, Donald Brooks and Joseph DeLatte exercised the high degree of care imposed on them in the handling and storage of hazardous substances, and your petitioners therefore plead the doctrine of res ipsa loquitur.

VIII.

Further in the alternative, and in any event, your petitioners aw, upon information and belief, that Mosaic Fertilizer, LLC. was the owner of the property on which the explosion and releases of hazardous substances occurred and is absolutely liable to your petitioners under the provisions of La.CC. Art. 667 and all other applicable provisions of Louisiana law for the; damage resulting from the use of its premises in a manner by which harm to the vicinage has occurred.

IX.

Upon information and belief, it is alleged that your petitioners and other persons in the vicinity of the explosion and releases of hazardous substances sustained damages including, but not limited to, personal, mental, emotional and economic damages and/or inconvenience.

X.

The explosion and release of hazardous substances permeated the atmosphere over the area adjacent to and downwind of the Mosaic Fertilizer, LLC. facility site and into the surrounding communities,

XI.

All of the above caused considerable fear, anguish, discomfort and inconvenience of the populace of the communities surrounding the Mosaic Fertilizer, LLC. site as well as bodily injuries.

XII.

The claims of each of lie plaintiffs herein for damages is less than 574,999.00.

XIII.

Until a more precise determination is made of the geographical area affected by the release of toxic substances, petitioners allege that the class consists of all persons and entities located or residing in the Parish of St. James who sustained personal, mental, emotional and economic damages and/or inconvenience as a result of the explosion and release of hazardous substances at the Mosaic Fertilizer, LLC. facility which occurred on October 11,2006.

XIV.

This action is appropriate for determination through the Louisiana Class Action Procedure (La.C.C.P. art. 591, et seq.) for the following reasons:

1. The large number of p otential claimants presents a level of numerosity better handled through the class action procedure as opposed to amass joinder of individual claims;
2. The common issues of law and fact pertaining to the determination of fault and the liability for compensatory and exemplary damages predominate over the individual
issues of quantum;
3. The determination of fault and the basis for assessment of compensatory damages may e made in the class action without the necessity of proof at that time as to the amount of those damages, thereby establishing the guidelines for settlement and/or subsequent trials in individual cases if necessary;
4. Petitioners herein have sustained damages of the nature described herein above and are suitable representatives of the class;
5. The class representatives herein are represented by skilled attorneys who are experienced in the handling of mass tort class action litigation and who may be expected to handle this action in an expeditious and economical manner to the best interest of all members of the class;
6. The Louisiana Class Action Procedure affords a superior vehicle for the efficient disposition of the issues and claims herein presented.

WHEREFORE, your petitioner prays:

1. That the defendant be served with a copy of this Petition and cited to appear and answer same;

2. That after due proceedings had, that this actkmbe certified as a class action pursuant to the provisions of La.C.C.P. art 591 et seq., in the respects alleged hereinabove, for the purposes of determining the common issues of liability for compensatory and exemplary damages and the basis for assessment of exemplary damages, if any;

3. That upon certification of the class action, the

Court call for the formulation of a suitable management plan pursuant to La C.C.P. 593.1(C);

4. That after due proceedings had and a trial by jury, there be a judgment in this matter in favor of the plaintiffs and against the defendant, Mosaic Fertilizer, LLC. declaring that said defendant is liable, in solido, to the plaintiff and all members of the class for compensatory and exemplary damages resulting from the releases of toxic substances at the Mosaic Fertilizer, LLC. facility in St. Charles Parish, on July 20, 1995, and further decreeing the basis on which exemplary damages may be assessed against the defendants held liable therefore in. this proceeding;

5. That the rights of the plaintiff and-all members of the class to establish their entitlement to compensatory and exemplary damages, and the amounts thereof, be reserved for determination in their individual actions when appropriate;

6. That plaintiffs recover their costs for the prosecution of this class action, and for interest on all damages from the date of judicial demand until paid.

Respectfully submitted:
BY ATTORNEYS:

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9959 Highway 18, St. James Parish, Louisiana

Case2:06-cv-0951
Filed 01/06/2007
Document 10
United States District Court
Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY	*CIVIL ACTION NO. 06-9510
ULYSSES GAUTHREAUX	*
LIONEL AND ERNESTINE	
ALBERT; AND	*SECTION: S-M1
ALL OTHER SIMILARLY	*
SITUATED PERSONS	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
MOSAIC FERTILIZER, LLC	

****

MOTION FOR LEAVE OF COURT TO FILE REPLY TO OPPOSITION TO MOTION TO REMAND

NOW INTO COURT comes the Plaintiffs, who respectfully request that they be granted leave of court to file *Reply to Opposition to Motion to Remand*, for the following good cause shown:

1.

On January 16, 2006, Mosiac filed *Opposition to Motion to Remand*, which raises arguments not addressed in the Plaintiffs' original memorandum in support of motion to remand to which a reply may assist this Court in the adjudication of this matter.

WHEREFORE the Plaintiffs pray that leave be granted to them to file *Reply to Opposition to Motion to Remand.*

Respectfully submitted:

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By Donna Grodner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served via U.S. mail and/or fax as indicated below to counsel of record this 26th day of January, 2006.

S/_____
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY	*CIVIL ACTION NO. 06-9510
ULYSSES GAUTHREAUX	*
LIONEL AND ERNESTINE	
ALBERT; AND	*SECTION: S-M1
ALL OTHER SIMILARLY	*
SITUATED PERSONS	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
MOSAIC FERTILIZER, LLC	

* *

ORDER ADJUDICATING
MOTION FOR LEAVE OF COURT TO FILE
REPLY TO OPPOSITION TO MOTION TO REMAND

CONSIDERING the *Motion for Leave of Court to File Reply to Opposition to Motion to Remand*, the motion is hereby _____.

New Orleans, Louisiana, this ___ day of _____, 2007.

_____
Judge Lemmon

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY	*CIVIL ACTION NO. 06-9510
ULYSSES GAUTHREAUX	*
LIONEL AND ERNESTINE	
ALBERT; AND	*SECTION: S-M1
ALL OTHER SIMILARLY	*
SITUATED PERSONS	*JUDGE LEMMON
	*
v.	*MAGISTRATE SHUSHAN
	*MOSAIC FERTILIZER, LLC

****

REPLY TO OPPOSITION
TO MOTION TO REMAND

MAY IT PLEASE THE COURT:

On January 16, 2006, Mosiac filed *Opposition to Motion to Remand.* This Court should remand this matter.

For some reason, Mosiac wants to argue the CAFTA does not govern jurisdiction over "class action" litigation filed in state court and removed to federal court.

A fundamental rule of statutory interpretation, which requires on authority, is that where there are two or more statutes, the specific supersedes the general. Here, CAFTA is a specific jurisdictional rule governing jurisdiction over "class actions".

28 USC § 1332 (d) specifically provides, In this subsection - "[T]he term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action. . . . " Subpart (d)(2)(C) provides that "[A] district court shall have original jurisdiction of any civil action in which the **matter in controversy exceeds the sum or value of $5,000,000,** exclusive of interest and costs, and is a class action in which - . . . ." Thus, if Mosiac will agree that this action meets the definition of "class action", all parties must concede that Subpart (d)(2)(C), which is specific to class action applies to this case.

Thus, on its face the statute applies to this case.

Mosiac, however, states, "Plaintiffs cite no authority whatsoever for the argument that CAFA is now

the "exclusive" basis for federal court jurisdiction over class actions. Traditional diversity jurisdiction under 28 USC § 1332 (a) still exits." Oddly, Mosiac cites no authority for its position that Subpart (d) that is specific to "class action" does not apply, and, that, instead, the general provisions of Section 1332 (a) apply to this "class action". Certainly Mosiac would concede that Article III of the Constitution limits the subject matter jurisdiction of federal court to cases arising under this Constitution, the Laws of the United States, and Treaties made . . . ." Mosiac would also concede that Subpart (d) is specific to "class actions" and is an Act of Congress, and, thus, a law of the United States. Considering these necessary concessions, all parties must agree that Subpart (d) applies to this case. Any argument to the contrary is insupportable as a matter of law.

We agree that Subpart (d) expands the diversity jurisdiction of the federal courts over class actions. The Senate Committee on Judiciary expressly noted such, as follows:

> Overall, **new section 1332 (d) is intended to expand substantially federal court jurisdiction over class actions.** Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant. S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977.

Similarly 28 USC ¶ 1453 is a specific statute governing the removal of class actions. Again, the specific statute supersedes the general.

For these reasons, Mosiac's argument that Section 1332 (a) applies to class action litigation is insupportable and ignores a fundamental rule of statutory interpretation: the specific supersedes the general.

Obviously, Mosiac must have some knowledge that this action does not meet the $5M statutory minimum or it would not be arguing to apply Subpart (a).

Plaintiffs are entitled to discovery on the jurisdiction minimum that applies to "class actions".

CONCLUSION

This Court should allow the discovery sought.

Respectfully submitted:

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CERTIFICATE OF SERVICE

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(3)

No. 07-268

FILED

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SUPREME COURT U.S.

In The

Supreme Court of the United States

FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT; AND ALL OTHER SIMILARLY SITUATED PERSONS,

Petitioners,

v.

MOSAIC FERTILIZER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent takes issue with Petitioners' statement of the questions presented for review. The questions presented for review are:

1. Does the CAFA amendment to 28 U.S.C. § 1332, which is found in subsection (d)(2), irreconcilably conflict with 28 U.S.C. § 1332(a) such that it must be interpreted as providing the exclusive means for removal of state class actions, therefore precluding removal of class actions under traditional diversity, 28 U.S.C. § 1332(a)?

2. In determining whether the amount in controversy threshold required by 28 U.S.C. § 1332(a) for an individual class member's claim is met, is it appropriate for a district court to look to the state substantive law on damages recoverable by the class member?

LIST OF PARTIES TO THE PROCEEDING

Respondent also points out to the Court that following the removal of the underlying matter to federal court, the matter was consolidated with two other pending actions, *Vivian Folse, et al. v. Mosaic Fertilizer, LLC, et al.*, C.A. No. 06-9512, United States District Court, Eastern District of Louisiana and *Charlotte Anderson, et al. v. Mosaic Fertilizer, LLC*, C.A. No. 07-1465, United States District Court, Eastern District of Louisiana. The Plaintiffs in these two consolidated matters do not seek remand.

CORPORATE DISCLOSURE STATEMENT

Respondent, Mosaic Fertilizer LLC, provides the following Corporate Disclosure Statement pursuant to Supreme Court Rule 29.6:

> Mosaic Fertilizer LLC is owned by The Mosaic Company, Mosaic Global Operations Inc. and Phosphate Acquisition Partners L.P. The Mosaic Company is the only publicly traded company owning ten percent (10%) or more of Mosaic Fertilizer LLC.

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STATEMENT REGARDING CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Respondent takes issue with Petitioners' statement regarding the laws involved in this matter. The following laws are pertinent to this matter:

I. 28 U.S.C. § 1441(a):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

II. 28 U.S.C. § 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

III. 28 U.S.C. § 1332(d)(2):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

IV. 28 U.S.C. § 1453:

(a) **Definitions.** – In this section, the terms "class", "class action", "class certification order", and "class

member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 77p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

V. 28 U.S.C. § 1651:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

VI. Louisiana Code of Civil Procedure article 595(A):

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

STATEMENT REGARDING ORDER AND REASONS OF DISTRICT COURT ATTACHED TO PETITIONERS' APPENDIX IS INACCURATE AND INCOMPLETE

The Order and Reasons attached as Exhibit A to Petitioners' Appendix is not accurate and is incomplete. The Order and Reasons attached to the Petitioners' Appendix contains some language that is not found in the actual Order and Reasons entered by the district court. In addition, the Order and Reasons submitted by Petitioners omitted the three footnotes which are found in the actual Order and Reasons of

the district court. One of those footnotes is critical to this Court's determination as it clearly provides that the district court did not make a determination as to whether the matter was properly removed under the alternative basis alleged – 28 U.S.C. § 1332(d)(2). Accordingly, in order to present the court with an accurate reflection of the underlying court's Order and Reasons, Respondent has included the district court's Order and Reasons in an Appendix attached to this brief.

STATEMENT OF THE CASE

On the evening of October 11, 2006, there was an equipment failure on a process heat exchanger in the Ammonia Production Unit at Respondent Mosaic Fertlizer LLC's (Mosaic's) St. James, Louisiana fertilizer facility. The following day two class action lawsuits were filed in the 23rd Judicial District Court, St. James Parish, State of Louisiana arising out of the incident. Both class actions were removed to the United States District Court for the Eastern District of Louisiana and were consolidated. In addition, a multi-plaintiff action was filed. That action was also removed to federal court. All three matters were consolidated. The instant action, the second class action filed, is the only one in which remand is sought.

The Petitioners herein, all residents of St. James Parish, Louisiana, allege that they and others similarly situated suffered both personal injury and

property damage arising out of a "large explosion" on October 11, 2006 from Mosaic's St. James facility. The Petitioners allege that the proposed class consists of "all persons who or which on October 12, 2006 [sic], were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear or fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant." Petitioners sought relief against Respondent for "judgment unto plaintiffs for damages, cost, interest, and attorneys fees as may be allowed by law under any theory of law as expressly pled herein or as may be applicable to the facts pled herein or as they may develop and be presented during the trial of this matter."

Respondent removed the case on the grounds that the district court had subject matter jurisdiction over the matter under both the traditional diversity jurisdiction statute, 28 U.S.C. § 1332(a), and under the additional grant of jurisdiction provided by CAFA in 28 U.S.C. § 1332(d). The Petitioners then filed a motion to remand the case to state court.

In its opinion, the district court addressed whether or not it had traditional diversity jurisdiction over the matter. Having found that complete diversity existed, the district court turned to the issue of whether or not "the amount in controversy for at least one plaintiff exceeds $75,000." The district court stated:

It is facially apparent from the petition that the claim of at least one named plaintiff is likely to exceed $75,000. Harvey alleges that she was at home in her trailer when the explosion occurred. The explosion rocked her trailer and caused her such fear and surprise that she required emergency medical treatment for "uncontrolled" blood pressure and pulse. One of the concrete piers supporting her trailer is askew. Gauthreaux became afraid when he heard the explosion, which caused a large window in his home to break and other damage. The Alberts were at home when the explosion occurred. They allege damage to their home, including a cracked driveway and cracked living room floor and personal fear and fright. When awardable attorney's fees are attributed to Harvey, Gauthreaux, and the Alberts in calculating the amount in controversy, any one of their claims likely exceeds the jurisdictional threshold. Moreover, the plaintiffs have not filed stipulations or affidavits of the parties or counsel that their claims fall below the jurisdictional amount.[1]

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[1] See Order and Reasons of district court (page 3) attached as Exhibit A to the Respondent's Appendix. It should be noted that the Appendix attached to Petitioners' brief does not include the actual Order and Reasons of the district court. The Order and Reasons attached to Petitioners' Appendix contains language that is not found in the actual Order and Reasons entered by the district court and omits the three footnotes found in the actual Order and Reasons. Accordingly, this Court should not rely upon the Order and Reasons attached to Petitioners' brief.

Under the authority of *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864 (5th Cir. 2002), the district court properly considered awardable attorneys' fees to the class representatives under Louisiana class action law in its analysis. *Id.* at 870. After consideration of the claims of the named class representatives, including attributable attorneys' fees, the district court concluded that any one of the class representative's claims alone exceeded the jurisdictional threshold amount of $75,000.00. Accordingly, the district court concluded that it had original jurisdiction over this matter under 28 U.S.C. § 1332(a) and therefore the removal was proper under 28 U.S.C. § 1441(a). Based upon that finding, the district court properly denied Petitioners' motion to remand. The district court did not address the additional grant of jurisdiction under 28 U.S.C. § 1332(d)(2) (CAFA) since it was satisfied with jurisdiction under traditional diversity, 28 U.S.C. § 1332(a).[2]

Plaintiffs filed a writ of mandamus to the Fifth Circuit Court of Appeals raising the same issues that they have raised in their Petition for Certiorari to this Court. The Fifth Circuit denied the writ without opinion.

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[2] See Order and Reasons attached as Exhibit A to Respondent's Appendix, n. 1.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT THE WRIT OF CERTIORARI.

This case does not involve an important question of federal law that has not been, but should be, settled by this Court. Rather, the district court utilized traditional rules of statutory construction authorized by this Court to conclude that, based upon the clear and unambiguous terms found in 28 U.S.C. § 1332(a) and § 1332(d)(2), original jurisdiction exists over this matter. Therefore, there was no question that the removal was proper. Accordingly, in a situation such as this where the statutory basis upon which the class action was removed clearly supports the federal district court's exercise of jurisdiction over the removed matter, there is no serious question of federal law which needs to be settled by this Court.

In addition, the lower courts did not decide an important federal question in a way that conflicts with any relevant decision of this Court. To the contrary, in the course of evaluating whether removal of this matter to federal court was proper, the lower courts employed the procedure authorized by this Court for determining whether original subject matter jurisdiction existed. The lower court's position is not in conflict with this Court's decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002). Unlike the district court in *Syngenta,* which relied on the All Writs Act as the sole basis for asserting jurisdiction over the removed

action, the district court in this matter relied on the specific grant of original jurisdiction provided for in 28 U.S.C. § 1332(a) as the basis for asserting jurisdiction over the removed matter. Further, in the course of determining whether the named class representatives' claims exceeded the jurisdictional amount required by 28 U.S.C. § 1332(a), the district court employed the procedure authorized by this Court – it looked to state substantive law, including Louisiana Code of Civil Procedure article 595(A). Accordingly, the action by the district court is clearly not in conflict with *Syngenta* or any other decision of this Court. The Writ should therefore be denied.

A. 28 U.S.C. § 1332, as Amended by CAFA, Does not Limit Removal of State Putative Class Actions to Those that Meet the Parameters Set Forth in 28 U.S.C. § 1332(d)(2).

(1) Applicable Rules of Statutory Construction

"The text of a statute or rule is the primary, essential source of its meaning." Uniform Statute & Rule Construction Act (1995), § 10, 14 Uniform Laws Annotated (2005). In construing jurisdictional statutes, this Court has instructed that the statute's text should be examined in light of the context, structure, and related statutory provisions. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005). As recognized by

this court, "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518, 2534, ___ L.Ed.2d ___ (2007), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Further, with regard to two statutory provisions that address the same situation, this Court has instructed that: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). Also, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.*, citing *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

With regard to an amendment, this Court has instructed that when "Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole" and the courts "should give each as full a play

as possible." *Markham v. Cabell,* 326 U.S. 404, 411, 66 S.Ct. 193, 196, 90 L.Ed. 1969 (1945).

(2) Applying the Above Statutory Construction Rules, It is Clear That CAFA did not Supplant or Restrict the Traditional Diversity Jurisdiction Conferred Under 28 U.S.C. § 1332(a).

Applying the principles of statutory construction, it is clear that there is no support for Petitioner's position that 28 U.S.C. § 1332(d) provides the exclusive manner by which state court class actions may be removed to federal court after February 18, 2005. There is no ambiguity in 28 U.S.C. § 1332, as amended by CAFA. The provisions of 28 U.S.C. § 1332(a) and § 1332(d)(2) do not conflict with one another and can be read harmoniously to allow for removal of class actions under either or both subsections.

The context, structure and related statutes clearly indicate that the effect of CAFA, in particular the amendment to 28 U.S.C. § 1332 which added subsection (d), was to expand the original jurisdiction of federal courts to include class actions that fall within the parameters set forth in 28 U.S.C. § 1332(d)(2). The clear language of 28 U.S.C. § 1332, as amended by CAFA, does not indicate that Congress intended to prevent federal courts from exercising original jurisdiction over class actions that fall within the parameters of the traditional diversity jurisdiction

provision found in 28 U.S.C. § 1332(a). CAFA simply does not supplant or restrict the traditional diversity jurisdiction conferred under 28 U.S.C. § 1332(a). Rather, 28 U.S.C. § 1332, as amended by CAFA, provides parties seeking a federal forum "with an alternative to the traditional diversity-jurisdiction route." Fredman, *Plaintiff's Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1025 (2006). After the passage of CAFA, "the traditional path to diversity jurisdiction remains a viable option for some class actions." *Id.* at p. 1055.

(a) The Statutory Scheme Does not Support Petitioner's Position.

The general statute that governs removal of cases to federal district courts is found in 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to federal district court. Accordingly, if the federal district court has original jurisdiction over the matter that is to be removed, removal is authorized. Congress sets forth in 28 U.S.C. § 1332 the situations where the federal courts will be deemed to have original jurisdiction. One of these situations is the traditional diversity jurisdiction set forth in subsection (a) while the other is the recently added CAFA diversity jurisdiction set forth in subsection (d)(2).

There is absolutely nothing in the language of subsection (d)(2) in 28 U.S.C. § 1332 that indicates that its provisions preclude a class action from being removed based on the original jurisdiction provided for complete diversity in subsection (a). Reading 28 U.S.C. § 1441(a) together with 28 U.S.C. § 1332, it is clear that, in passing CAFA, Congress intended to, and in fact did, set forth an additional basis upon which a federal court is considered to have original jurisdiction and did not intend to narrow the scope of subsection (a). As this Court instructed in *Markham*, *supra* at 411, when Congress amends one section of a law and leaves another untouched, courts should consider that the two sections "were designed to function as parts of an integrated whole" and each section should be given "as full a play as possible." Giving subsection (a) and subsection (d)(2) "as full a play as possible," a class action which meets the criteria of subsection 28 U.S.C. § 1332(a) may be removed to federal court based upon the original jurisdiction provided for in that subsection, even after CAFA.

The fallacy in Petitioners' argument is revealed when one considers the scenario where a class action does not meet the criteria set forth in 28 U.S.C. § 1332(d)(2) (such as the $5,000,000.00 amount at controversy threshold) for original jurisdiction to exist over the class action, but the class action meets the criteria set forth in 28 U.S.C. § 1332(a) for original jurisdiction to exist over the class action. In that situation, 28 U.S.C. § 1332(d)(2) would clearly not be

applicable and there would be no possibility of a conflict between 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1332(a). Obviously, if one of the allegedly conflicting provisions does not even apply to the factual situation presented, there is no conflict and therefore, the other provision clearly applies.[3]

Petitioners have not cited to any language in the CAFA amendments or in 28 U.S.C. § 1332 that supports their argument that the only means for removal of class actions after the effective date of CAFA, is under 28 U.S.C. § 1332(d)(2). Rather, Petitioners have simply argued that since there happens to be a new provision under 28 U.S.C. § 1332 that allows certain class actions to be removed, that provision is the only means by which a class action may be removed. This argument is unfounded.

[3] Indeed, in this particular case, Petitioners have argued that the amount in controversy in this matter does not meet the $5,000,000.00 threshold required by 28 U.S.C. § 1332(d)(2). For the purpose of argument, if Petitioners are correct with regard to that contention (which is denied), then 28 U.S.C. § 1332(d)(2) is not applicable and for purposes of the case presented to this Court, there is no conflict between 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1332(a).

(b) 28 U.S.C. § 1453 Does Not Indicate That Class Actions Are Limited to Removal Under 28 U.S.C. § 1332(d)(2).

Contrary to Petitioner's contention, 28 U.S.C. § 1453 does not contain language that indicates that removal of a class action is limited to those class actions that fall within the parameters of 28 U.S.C. § 1332(d)(2). First, 28 U.S.C. § 1453 does not authorize any removals. Indeed, unlike 28 U.S.C. § 1332, 28 U.S.C. § 1453 does not confer original jurisdiction over any particular type of action. Rather, this statute simply sets forth procedural rules to be utilized in effectuating the removal of "class actions."

Petitioners incorrectly rely on the reference in 28 U.S.C. § 1453(a) to the definition of the terms "class" and "class action" found in 28 U.S.C. § 1332(d)(1) in support of their argument. Other than adopting the definitions for those terms that are found in 28 U.S.C. § 1332(d)(1), 28 U.S.C. § 1453 does not depend on 28 U.S.C. § 1332 in any other manner and certainly does not set forth a mandate regarding when a federal court will have jurisdiction over class actions. Accordingly, this statute does not support Petitioners' position.

(c) The Word "Shall" in 28 U.S.C. § 1332(d)(2) does not Indicate That Class Actions are Limited to Removal Under 28 U.S.C. § 1332(d)(2).

Petitioners also argue that Congress' use of the mandatory word "shall" in 28 U.S.C. § 1332(d)(2) indicates that the district court was limited to applying that section for removal of this action. Petitioners overlook the fact that the term "shall" is also found in 28 U.S.C. § 1332(a). Reading each of these subsections together, it is clear that Congress used the term "shall" in both subsections to indicate that there can be no question that a district court has original jurisdiction over any matter that falls within the parameters set forth in each of those subsections. The language of these subsections does not indicate that Congress intended to limit removal of class actions to those that fit within the parameters of 1332(d)(2).

(d) The Historical and Statutory Notes are Irrelevant.

Petitioners incorrectly refer the Court to portions of the Historical and Statutory Notes regarding the enactment of CAFA. As this Court recognized in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005), if the language in the statute at issue is unambiguous, a court cannot rely on extraneous matters to "adopt an artificial construction that is narrower than what the text provides." 545 U.S. at

558. Petitioners have not established that the statutory provisions at issue are ambiguous. Therefore, Petitioners' reliance upon this extraneous matter is clearly inappropriate.

In the alternative, even if the extraneous matter cited by Petitioners could be considered (which is denied), there is nothing in the notes cited by Petitioners that supports their position that Congress intended for the CAFA amendment to 28 U.S.C. § 1332, which added subsection (d), to provide the exclusive manner for removing class actions filed on or after that date. Further, the legislative history of CAFA is replete with statements that CAFA was intended to expand federal jurisdiction, not contract it.[4]

(e) "The Specific Prevails over the General" Rule Relied on by Plaintiffs is not Applicable Where There is no Irreconcilable Conflict.

Petitioners have incorrectly applied the "fundamental rule of statutory interpretation" – that "the specific supersedes the general". Petitioners have omitted a critical element that must exist before that rule comes into play. This rule of statutory interpretation provides: "Where there is **inescapable conflict**

[4] See, e.g., S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977.

between general and specific terms or provisions of a statute, the specific will prevail." 2A *Sutherland Statutory Construction* § 46:5 (7th Ed.). Accordingly, before the specific will be found to supersede the general, there must be a finding that a conflict exists between the two provisions at issue and that conflict must be one that is considered to be irreconcilable.

As noted above, there is no conflict between 28 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2), much less an irreconcilable one. Utilizing the rules of statutory interpretation adopted by this Court, the two subsections at issue can be read in harmony to allow for removal of class actions based on either the traditional diversity jurisdiction provision found in subsection (a) or based on the CAFA diversity jurisdiction provision found in subsection (d)(2).

Indeed, this Court recognized in *Allapattah* that CAFA did not eliminate the use of 28 U.S.C. § 1332(a) as a basis for removing a class action to federal court. In the context of discussing supplemental jurisdiction under 28 U.S.C. § 1367, this Court recognized that even after the passage of CAFA, there could be class actions that do not fall within CAFA's ambit that could be removed to federal court. 545 U.S. at 571-572.

B. The District Court Based its Finding of Original Jurisdiction on 28 U.S.C. § 1332(a) and not on a State Law.

Contrary to Petitioners' argument, the district court did not find that Louisiana Code of Civil Procedure

article 595(A) created federal subject matter jurisdiction over this matter. Rather, in the course of determining the amount in controversy as to the named class representatives' claims, the district court appropriately looked to Louisiana substantive law and considered the attorneys fees that were recoverable by the named class representatives under Louisiana Code of Civil Procedure article 595(A). The district court's ruling is consistent with principles established by this Court.

(1) Federal Courts Must Apply the Forum State's Rules Regarding the Applicable Measure of Damages, Including Special and Punitive Damages.

Under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), Louisiana law will provide the rule of decision in this case, so it was entirely appropriate for the district court to look to Louisiana law in determining the amount in controversy for the named class representatives' claims. Further, this Court has instructed that while the determination of the value of the matter in controversy for purposes of establishing federal jurisdiction is a federal question to be decided under federal standards, "the federal courts must, of course, look to state law to determine the nature and the extent of the right to be enforced in a diversity case." *Horton v. Liberty Mut. Ins. Co.,* 367 U.S. 348, 352-353, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890 (1961). "This includes applying the forum state's rules regarding the applicable measure

of damages and the availability of special and punitive damages." 14 B. Wright & A. Miller, Federal Practice & Procedure § 3702 citing, *Vance v. W.A. Vandercook Co.*, 170 U.S. 468, 472, 18 S.Ct. 645, 647, 42 L.Ed. 1111 (U.S. 1898).

The district court clearly did not err in considering the attorneys fees that were recoverable by the named class representatives under Louisiana Code of Civil Procedure article 595(A) in the course of determining whether the amount in controversy requirement of 28 U.S.C. § 1332(a) had been satisfied.

(2) The District Court's Ruling is Consistent with this Court's *Allapattah* Opinion.

The district court's approach is also consistent with this Court's ruling in *Allapattah, supra,* as well as the United States Court of Appeals for the Fifth Circuit's ruling in *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied,* 538 U.S. 945, 123 S.Ct. 1634, 155 L.Ed.2d 486 (2003).[5] In

[5] *Grant* involved a class action lawsuit filed under Louisiana law seeking tort damages resulting from an industrial accident at a chemical plant. The case was removed on the basis of diversity of citizenship jurisdiction, and remand was denied after the court found that the Louisiana class action attorney's fee statute allowed attorney's fees to be awarded and mandated that, if awarded, they must be attributed to the named class representative's claim.

Allapattah, *supra*, this Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, allows a district court to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has jurisdiction over the claims of at least one of the class representatives. In *Grant,* the Fifth Circuit, applying this same principle, held that "when there is state statutory authority for the court to award attorney's fees to class representatives, 'either with mandatory or discretionary language, such fees may be included in the amount in controversy.'"[6] *Grant,* 309 F.3d at 874, *quoting Galt G/S v. JSS Scandinavia,* 142 F.3d 1150, 1156 (9th Cir. 1998). The *Grant* court concluded that Louisiana Code of Civil Procedure article 595(A) provides the statutory authority for a court to award attorney's fees to the named class representative. *Id.* at 876. Therefore, in determining the amount in controversy for the named class representatives' claims, it is proper to consider the attorneys fees that the named class representatives would have a right to recover as a result of article 595(A).

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[6] *Grant* was decided before this Court's ruling in *Allapattah*, but the Fifth Circuit in *Grant,* relied upon principles that were first expressed by the Fifth Circuit in *In re: Abbott Laboratories,* 51 F.3d 524 (5th Cir. 1995). This Court's rationale in *Allapattah*, *supra*, is consistent with the rationale of *Abbott.*

(3) The District Court's Ruling is Also Consistent with *Syngenta*.

Petitioners' lengthy discussion of *Syngenta Crop Protection, Inc. v. Henson,* 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) misses the mark. The case here has nothing to do with the All Writs Act, 28 U.S.C. § 1651, and, unlike the district court in *Syngenta*, the district court in this case did not look beyond the diversity jurisdiction statute, 28 U.S.C. § 1332, to find subject matter jurisdiction. As Petitioners note in their brief at p. 12, *Syngenta*, recognized that, based upon the plain terms of 28 U.S.C. § 1441(a), in order properly to remove an action pursuant to § 1441(a), "petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts." 537 U.S. 28, 33, 123 S.Ct. 366, 370. In *Syngenta*, the removing parties failed to rely on a specific statutory grant of original jurisdiction. Presumably because the removing parties in *Syngenta* could not establish that the claims fell within the grant of original jurisdiction found in 28 U.S.C. § 1332 for diversity cases, they attempted to use the All Writs Act, found in 28 U.S.C. § 1651, as a basis for establishing original jurisdiction for purposes of removal under 28 U.S.C. § 1441(a). The problem with that was that there is no specific language in the All Writs Act that creates original jurisdiction over a matter. In contrast, Respondents in this matter relied upon a clear and specific grant of original jurisdiction over the claims at issue in 28 U.S.C. § 1332(a) as the basis for establishing that removal of this matter

under 28 U.S.C. § 1441(a) was proper. Accordingly, Petitioners' reliance on *Syngenta* is misplaced.

(4) The District Court Properly Looked to Louisiana Law in Determining the Amount in Controversy.

Utilizing the procedure established by this Court in *Erie*, *supra*, *Horton*, *supra*, and *Allapattah*, *supra*, and by the Fifth Circuit in *Grant*, the district court in this matter properly looked to Louisiana law to evaluate whether one of the requirements of § 1332(a), the amount in controversy, was satisfied as to the named class representatives' claims. The district court's ruling here is, for all salient purposes, the same as the Fifth Circuit's ruling in *Grant*, *supra*. This Court denied the application for a writ of certiorari in *Grant*, *supra*, and there is no reason here to do differently.

Petitioners are incorrect in taking the position that Louisiana Code of Civil Procedure article 595(A) is procedural and that the Fifth Circuit's decision in *Grant*, *supra*, is in conflict with *Syngenta*, *supra*. The Fifth Circuit's holding in *Grant*, *supra*, does not vest the Louisiana Legislature with the authority under the United States Constitution to enact procedural statutes that vest federal courts with original subject matter jurisdiction. As stated above, *Grant*, *supra*, simply recognized that, in determining the amount in controversy for the named class representatives' claims, it was proper for the district court to consider

the attorneys fees that the named class representatives would have a right to recover under Louisiana law. That right is statutorily found in Louisiana Code of Civil Procedure article 595(A). The Fifth Circuit correctly rejected any argument that this right to attorneys fees was procedural in nature because it happens to be found in the Louisiana Code of Civil Procedure. The Fifth Circuit looked to the nature of the right and held: "[D]espite its location in the **LCCP, art. 595(A) is obviously substantive on its face**, specifying entitlement to costs and fees, not when or how to plead them, whether a motion is required, or the like." *Id.* at 875, n.37 (emphasis added); see also, *Abbott, supra*. Accordingly, as a substantive right under Louisiana law, the district court, sitting in diversity, was bound to apply that law. *Erie, supra.*

Grant is not in conflict with *Syngenta*. *Grant* did not expand the scope of original jurisdiction by authorizing state legislatures to create federal subject matter jurisdiction. *Grant* simply applied longstanding federal jurisprudence in finding that Louisiana Code of Civil Procedure article 595(A) is indeed a substantive statute and applied that statute to determine the amount in controversy for purposes of establishing original jurisdiction under 28 U.S.C. § 1332(a). Contrary to Petitioner's position, the district court in *Grant,* as well as the district court in this matter, did not rely on a state statute to create original jurisdiction in the federal courts. Rather, the district courts relied on the grant of original jurisdiction provided for in 28

U.S.C. § 1332(a). The court's reference to Louisiana code of Civil Procedure article 595(A) was simply for the purpose of determining the amount in controversy. Accordingly, the Fifth Circuit's decision in *Grant* and the district court's decision in this matter, are not in conflict with *Syngenta* and are in accord with the jurisprudence of this Court.

C. In the Alternative, if this Court Concludes that Removal of a Class Action is not Proper Under 28 U.S.C. § 1332(a), this Court Should Remand to the District Court for a Determination of Whether Removal was Proper Under 28 U.S.C. § 1332(d)(2).

Finally, in the alternative, if this Court should find that the only basis upon which a state class action, such as the one at issue, may be removed after CAFA is on the basis provided for in 28 U.S.C. § 1332(d)(2) (which is denied), this matter should be remanded to the district court for a determination of whether removal was proper under 28 U.S.C. § 1332(d)(2). See Supreme Court Rule 10. This matter was removed to federal court based upon both 28 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2).[7] In footnote 1 of the district court's Order and Reasons, the court states: "The court does not address Mosaic's alternative basis of jurisdiction under the Class

[7] See Respondent's Notice of Removal attached as Exhibit B to Petitioners' Appendix.

Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).[8] Accordingly, while there is ample support in the Petitioner's complaint, in the record, and in the relevant jurisprudence to support a finding that the aggregate of the class members' claims exceeds $5,000,000.00, the district court did not make a determination with regard to that basis for removal. Therefore, in the event that this Court should conclude that, under CAFA, the exclusive means for removing state class actions is under 28 U.S.C. § 1332(d)(2) (which is denied), this Court should remand the matter to the district court for a determination of whether the removal was proper under that provision.

CONCLUSION

The Petitioners have not established a compelling reason for this Court to grant a writ of certiorari in this matter. The underlying decisions of the district court and the Fifth Circuit do not raise an important

[8] See Order and Reasons of district court (page 2, note 1) attached as Exhibit A to the Respondent's Appendix. It should be noted that the Appendix attached to Petitioners' brief does not include the actual Order and Reasons of the district court. The Order and Reasons attached to Petitioners' Appendix contains language that is not found in the actual Order and Reasons entered by the district court and omits the three footnotes found in the actual Order and Reasons. Accordingly, this Court should not rely upon the Order and Reasons attached to Petitioners' brief.

question of federal law that needs to be settled by this Court. The district court properly utilized the traditional rules of statutory construction adopted by this Court and interpreted the jurisdictional provisions found in 28 U.S.C. § 1332(a) and § 1332(d)(2). Those provisions are not ambiguous, are not in conflict with each other, and can be read harmoniously to allow for removal of class actions under either the complete diversity provision found in 28 U.S.C. § 1332(a) or under the CAFA diversity jurisdiction provision found in 28 U.S.C. § 1332(d)(2). Accordingly, a writ of certiorari is not warranted.

Petitioners also have not established that the position taken by the district court is in conflict with any decision of this Court. The district court properly relied on the specific grant of original jurisdiction provided for in 28 U.S.C. § 1332(a) as the basis for asserting jurisdiction over the removed matter. In the course of determining whether the named class representative's claim exceeded the jurisdictional amount required by 28 U.S.C. § 1332(a), the district court employed the procedure authorized by this Court. It looked to state substantive law, including Louisiana Code of Civil Procedure article 595(A). Such action is clearly in accord with this Court's prior decisions. Accordingly, there is no compelling reason to grant the writ of certiorari in this matter.

Finally, in the alternative, if this Court should find that the only basis upon which a state class action, such as the one at issue, may be removed after CAFA is on the basis provided for in 28 U.S.C.

§ 1332(d)(2) (which is denied), this matter should be remanded to the district court for a determination of whether the matter was properly removed under 28 U.S.C. § 1332(d)(2). While there is ample support in the Petitioner's complaint, in the record, and in the relevant jurisprudence to support a finding that the aggregate of the class members' claims exceeds $5,000,000.00, the district court did not make a determination with regard to that basis for removal. Accordingly, in the alternative, this Court should remand the matter to the district court for a determination of whether the removal was proper under that provision.

The Petition for Writ of Certiorari should be denied.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY ET AL.	CIVIL ACTION
VERSUS	NO: 06-9510
MOSAIC FERTILIZER, L.L.C.	SECTION: "S" (5)

ORDER AND REASONS

IT IS HEREBY ORDERED that the motion to remand of Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert is DENIED. (Document #7.)

I. BACKGROUND

Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert filed a "Class Action Petition for Damages" in the 23rd Judicial District Court for the Parish of St. James, State of Louisiana, against Mosaic Fertilizer, L.L.C. a/k/a Mosaic Faustina Fertilizer Plant (Mosaic or Faustina), on behalf of themselves and others similarly situated in sustaining damage as a result of an explosion and release of hazardous substances from the Mosaic facility in St. James Parish. On October 11, 2006, workers at the Faustina facility were processing product when hydrogen gas leaked and ignited. The plaintiffs allege a claim of negligence for the acts of others, pursuant to La. Civil Code art. 2317.

Mosaic, a Delaware corporation with its principal place of business in Florida, removed the case to

federal court, asserting diversity jurisdiction.[1] The plaintiffs filed a motion to remand the case to state court.

II. DISCUSSION

Mosaic contends that the amount in controversy for at least one plaintiff exceeds $75,000.[2]

Motions to remand to state court are governed by 28 U.S.C. § 1447(c), which provides in relevant part: "If at any time before the final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." "District courts have original jurisdiction over civil actions where the amount in controversy exceeds $75,000, and there is diversity between all parties." *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999). Under Louisiana law, a plaintiff is prohibited, except in circumstances not relevant here, from alleging a specific dollar amount of damages. *Grant v. Chevron Phillips Chemical Co., L.P.*, 309 F.3d 864, 868 (5th Cir. 2002). However, the plaintiff may recover an award in damages more than he demands. *Id.* at 869. In such situations, the removing defendant must prove by a preponderance of the evidence that the

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[1] The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).

[2] The plaintiffs do not argue that diversity of citizenship is lacking.

amount in controversy exceeds $75,000. *Id.* at 868. "The removing party may satisfy this burden in either of two ways: "(1) by demonstrating that it is 'facially apparent' from the petition that the claim likely exceeds $75,000 or (2) by setting forth the facts in controversy – preferably in the removal petition, but sometimes by affidavit – that support a finding of the requisite amount." *Id.*

In Louisiana cases, "the federal district court's jurisdictional-amount calculus must include attorney's fees when an applicable Louisiana statute allows the award of such fees. *Id.* All awardable attorney's fees in a class action[3] are attributed to the class representatives to the exclusion of other members of the class. *Id.* at 870-71. "[C]alculation of the anticipated recovery of the class representatives – the only one that matters for purposes of § 1332 – must include those potential attorney's fees in addition to damages." *Id.* at 873.

It is facially apparent from the petition that the claim of at least one named plaintiff is likely to exceed $75,000. Harvey alleges that she was at home in her trailer when the explosion occurred. The explosion rocked her trailer and caused her such fear and

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[3] La. Code Civ. Proc. art 595(a) provides:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

surprise that she required emergency medical treatment for "uncontrolled" blood pressure and pulse. One of the concrete piers supporting her trailer is askew. Gauthreaux became afraid when he heard the explosion, which caused a large window in his home to break and other damage. The Alberts were at home when the explosion occurred. They allege damage to their home, including a cracked driveway and cracked living room floor, and personal fear and fright. When awardable attorney's fees are attributed to Harvey, Gauthreaux, and the Alberts in calculating the amount in controversy, any one of their claims likely exceeds the jurisdictional threshold. Moreover, the plaintiffs have not filed stipulations or affidavits of the parties or counsel that their claims fall below the jurisdictional amount.

Accordingly, there is diversity jurisdiction, and the motion to remand is denied.

New Orleans, Louisiana,
this 19th day of March, 2007.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE